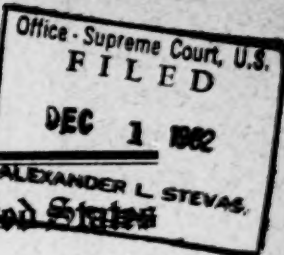


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No.



In the Supreme Court of the United States

OCTOBER TERM, 1982

FEDERAL COMMUNICATIONS COMMISSION, APPELLANT

v.

LEAGUE OF WOMEN VOTERS OF CALIFORNIA, ET AL.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether 47 U.S.C. 399, which prohibits "editorializing" by noncommercial educational broadcasting stations that receive grants from the Corporation for Public Broadcasting, violates the First Amendment.

PARTIES TO THE PROCEEDING

In addition to the appellee named in the caption, the appellees include Pacifica Foundation and Henry Waxman.

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App. A, *infra*, 1a-20a) is reported at 547 F. Supp. 379.

JURISDICTION

The judgment of the district court (App. B, *infra*, 21a-22a) was entered on August 5, 1982. The notice of appeal (App. C, *infra*, 23a) was filed on September 3, 1982. On October 26, 1982, Justice Rehnquist extended the time for docketing an appeal until December 1, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the Constitution provides in pertinent part:

Congress shall make no law * * * abridging the freedom of speech, or of the press * * *.

2. 47 U.S.C. 399, as amended by the Public Broadcasting Amendment Act of 1981, Section 1229, Pub. L. No. 97-35, 95 Stat. 730, provides:

No noncommercial educational broadcasting station which receives a grant from the Corporation [for Public Broadcasting] under subpart C of this part may engage in editorializing. No noncommercial educational broadcasting station may support or oppose any candidate for political office.

STATEMENT

1. Congress enacted the Public Broadcasting Act of 1967, 47 U.S.C. (& Supp. IV) 390 *et seq.*, in order "to encourage the growth and development of public radio and television broadcasting, including the use of such media for instructional, educational and cultural purposes" (47 U.S.C. (& Supp. IV) 396). To achieve these goals, Congress made considerable financial assistance available "to assist in providing the broadcast facilities necessary to carry educational radio and television programs * * * [and to encourage the development of] programs of high quality, responsive to the cultural and educational needs of the people" (S. Rep. No. 222, 90th Cong., 1st Sess. 2 (1967)). At the same time, Congress wanted to prevent the government's substantial financial support from subjecting public broadcasters to

undue political influence or pressure.¹ Thus, to ensure that the discussion of important public issues would not be distorted by government funding, Congress enacted several safeguards, including the predecessor of the provision at issue in this case.²

In its original form, 47 U.S.C. 399 stated that "[n]o noncommercial educational broadcasting sta-

¹ See 113 Cong. Rec. 26383 (1967) (remarks of Rep. Staggers: "[A] concern, shared by all members of the committee [is] that the proposed [Legal Broadcasting] Corporation could become an instrument for political propaganda. We think we have solved the problems with extensive legislative language in the bill"); *id.* at 26392 (remarks of Rep. Watson: "There is another potential danger. This Corporation could [become] a propaganda monster * * *"); *id.* at 26394 (remarks of Rep. Brotzman: "The fear of Government control of programming was recurrent during consideration of this bill by my committee. [The amendment that, inter alia, prohibits editorializing] will prevent this corporation from becoming a Government propaganda tool"); *id.* at 26399 (remarks of Rep. McClure: "[I am concerned that] programs produced by the Corporation will be used for propaganda purposes, to encourage a particular political philosophy or to keep a political party in power"); *id.* at 26407 (remarks of Rep. Springer); *id.* at 26408 (remarks of Rep. Brown); *id.* at 26412 (remarks of Rep. McCormack).

² In addition to the prohibition against editorializing and supporting political candidates, the Act now provides that many federal grants to public broadcasting are to be made by a private, nonprofit corporation, the "Corporation for Public Broadcasting"; that members of the Corporation's board of directors may not be employees or officers of the United States; that no more than six of the 10 members of the board may belong to the same political party; and that the corporation may not own or operate any public broadcasting station (95 Stat. 725-726, 47 U.S.C. 396(c)). In addition, no federal official is authorized to direct or control any of the corporation's activities or to direct or control the content or distribution of programs (47 U.S.C. 399).

tion may engage in editorializing or may support or oppose any candidate for political office." The Federal Communications Commission has construed "editorializing" to mean only the "use of noncommercial educational broadcast facilities by licensees, their management or those speaking on their behalf for the propagation of the licensees' own views on public issues * * *." *In re Complaint of Accuracy in Media, Inc.*, 45 F.C.C.2d 297, 302 (1973).³ Accordingly, broadcasters are not precluded from airing programs advocating controversial views as long as editorials are not issued in the broadcaster's name. Congress took pains to "emphasize[] that these provisions [prohibiting editorializing] are not intended to preclude balanced, fair, and objective presentations of controversial issues by noncommercial educational broadcast stations" (H.R. Rep. No. 794, 90th Cong., 1st Sess. 12 (1967)).

When the original act was passed, it was generally assumed that all public broadcasting stations would receive government funding, and the prohibition against editorializing extended to all public broadcasters.⁴ That assumption proved unfounded,⁵ and

³ The Federal Communications Commission is charged with the administration of 47 U.S.C. 399. See 47 U.S.C. 151.

⁴ See, e.g., 113 Cong. Rec. 26416 (1967) (amendment proposed by Rep. Devine, which would have authorized \$5 million to be "divide[d] equally and distribute[d] among educational broadcasting stations in the United States which are in existence on the date of enactment").

⁵ In 1970, as described by the Carnegie Commission on the Future of Public Broadcasting, the Corporation for Public Broadcasting determined to target its grants so as "to create a core of well-financed, professional stations * * * [and] to encourage stations seeking CPB aid [who were] dedicated to

47 U.S.C. 399 was amended in 1981 so that the prohibition of editorializing would extend only to those stations that receive Corporation for Public Broadcasting funds (Public Broadcasting Amendment Act of 1981, Pub. L. No. 97-35, 95 Stat. 725 *et seq.*).

2. Appellee Pacifica Foundation is a non-profit educational corporation that owns and operates non-commercial educational broadcasting stations in five major markets (App. A, *infra*, 6a). Its licensees receive Corporation for Public Broadcasting grants and are therefore prohibited from editorializing (*ibid.*). In 1979, Pacifica and others⁶ brought this suit in the United States District Court for the Central District of California challenging the constitutionality of the provisions of 47 U.S.C. 399 that prohibited public broadcasters from editorializing or supporting candidates for political office. In October 1979, former Attorney General Civiletti informed the Senate that the Department of Justice would not defend the constitutionality of the statute, in part because it applied to all public broadcasting stations and not just to those receiving federal aid. The Senate then adopted a resolution, pursuant to 2 U.S.C. (Supp. V)

general educational or cultural service, rather than strictly institutional service or religious programming * * *." Carnegie Commission, *A Public Trust: The Report of the Carnegie Commission on the Future of Public Broadcasting* 189 (1979).

⁶ The League of Women Voters of California and Representative Henry Waxman are also plaintiffs in this suit. The district court did not resolve whether these plaintiffs have standing to bring this action since their complaint, as ultimately amended, did not seek relief independent of that sought by Pacifica (App. A, *infra*, 7a).

288e(a), directing its counsel to intervene as *amicus curiae* and defend the suit (App. A, *infra*, 3a & n.3).⁷

In April 1981, Attorney General Smith notified the Senate that the Department of Justice would defend the statute and noted that the statute could be narrowly construed to avoid constitutional defects. The government subsequently urged the district court to uphold the constitutionality of the statute at least insofar as it applied to publicly-funded stations. See Defendant's Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Summary Judgment 11-20. While the suit was pending, Congress enacted the recent amendment of 47 U.S.C. 399 that expressly confines the prohibition of editorializing to those stations that receive Corporation for Public Broadcasting funds. Thereafter, appellees amended their complaint and abandoned their attack upon the portion of the statute forbidding public broadcasters to endorse political candidates (App. A, *infra*, 5a). Their sole remaining claim was that the prohibition of editorializing violates the First Amendment (*ibid.*).

3. The district court granted summary judgment in favor of appellees (App. B, *infra*, 21a-22a). The court first concluded (App. A, *infra*, 11a) that "Section 399 can survive scrutiny under the First Amend-

⁷ The district court granted the Senate's motion to dismiss the complaint on the ground that there was no justiciable controversy because the government had decided not to enforce the statute (App. A, *infra*, 4a). Plaintiffs appealed, and during the pendency of the appeal, the Attorney General notified the court of appeals of his decision to defend the suit. The court of appeals then remanded the case to the district court; the district court vacated its order of dismissal; and the Senate Legal Counsel withdrew from the litigation (*ibid.*).

ment only if * * * it serves a compelling government interest and is narrowly tailored to that end." Observing that "regulations such as § 399 are presumptively unconstitutional," the court then held that Section 399 was not supported by any compelling government interest (*ibid.*).

The court refused to accept the contention (App. A, *infra*, 11a) that "§ 399 serves a compelling government interest in ensuring that funded noncommercial broadcasters do not become propaganda organs for the government." The court noted (App. A, *infra*, 12a-13a) that "[Corporation for Public Broadcasting] funding in 1977 did not constitute more than approximately 25%" of the budget of the average station receiving such aid, that "no broadcaster receives more than approximately 33% of its funds through [such] grants," that Pacifica allegedly received only 14% of its total revenue from such grants, and that the amount of Corporation for Public Broadcasting funding was being reduced. The court also concluded (*id.* at 13a-14a) that fear of government pressure was unfounded because the Corporation for Public Broadcasting "is an independent, nonprofit, private corporation"; because the Corporation's "funding decisions are based on objective, non-discretionary criteria"; and because the "fairness doctrine"^{*} prevents broadcasters from presenting "one-sided political propaganda."

The court similarly rejected (App. A, *infra*, 15a) the government's contention that "restrictions on

^{*} The "fairness doctrine" imposes on all broadcasters—public and commercial—two affirmative responsibilities: "coverage of issues of public importance must be adequate and must fairly reflect differing viewpoints." *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 111 (1973).

editorializing are necessary to ensure that government funding of noncommercial broadcast stations will not interfere with the balanced presentation of opinion on those stations." The court found no evidence that Congress had enacted Section 399 for that purpose and that, in any event, such a "concern [was] not sufficiently compelling to justify the ban on speech imposed by § 399 under the First Amendment" (App. A, *infra*, 17a).⁹

THE QUESTION IS SUBSTANTIAL

The district court has declared unconstitutional an important statutory provision that not only serves the vital function of insulating government-funded public broadcasting stations from political influence but also prevents the use of public funds to propagate controversial private views. The court apparently attached no legal significance to the fact that the provision of 47 U.S.C. 399 regarding editorializing now applies only to those stations that voluntarily accept Corporation for Public Broadcasting grants. The court therefore applied an unduly strict test in deciding whether that provision satisfies First Amendment standards. Based largely upon its own sanguine assessment of the possibility of government pressure upon public broadcasters, the court also seriously underestimated the substantial and legitimate interest served by the provision against editorializing.

Congress recently reviewed the need for the provision on editorializing and decided to retain it in revised form, both because it was Congress' judgment

⁹ Because the court held that Section 399 violates the First Amendment, the court did not rule upon *Pacifica's* claim that that provision also violates the equal protection guarantee contained in the Due Process Clause of the Fifth Amendment (App. A, *infra*, 18a-20a).

that the provision meets First Amendment standards and because Congress continued to believe that it serves important public needs. This Court should note probable jurisdiction to review the district court's exercise of "the grave power of annulling an Act of Congress." *United States v. Gainey*, 380 U.S. 63, 65 (1965).

1. The district court plainly erred in holding (App. A, *infra*, 11a) that the prohibition of editorializing by certain public broadcasting stations "can survive scrutiny under the First Amendment only if * * * it serves a compelling government interest and is narrowly tailored to that end." Because the prohibition of editorializing applies only to those broadcasters who voluntarily receive certain government grants, that provision is a legitimate exercise of Congress' Spending Power. "Congress has frequently employed the Spending Power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives. This Court has repeatedly upheld against constitutional challenge the use of this technique to induce governments and private parties to cooperate voluntarily with federal policy" (*Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980) (opinion of Burger, C.J.)).

This Court has never held or suggested that restrictions on expression imposed as conditions to the receipt of federal funds must be supported by a compelling government interest, and it is apparent that any such blanket rule would lead to absurd results. Certainly Congress may direct that federal funds be spent for a particular purpose and not for others without demonstrating a compelling reason for its

choice. For example, Congress has prohibited the unauthorized use of federal funds for lobbying (18 U.S.C. 1913) even though lobbying is protected by the First Amendment. Congress has also prohibited the International Communication Agency (the successor of the United States Information Agency and the Voice of America) from disseminating information within this country (22 U.S.C. (Supp. IV) 1461), despite the fact that such a restriction would certainly violate the First Amendment if applied to a private news organization. If Congress had chosen to establish a state-owned broadcasting system, as most countries have, rather than subsidizing private noncommercial stations, there seems little doubt that Congress could have prohibited officers and employees of the system from "editorializing" in the name of the system.¹⁰

The prohibition of editorializing at issue here, while not strictly analogous, nevertheless shares many of the characteristics of the restrictions noted above. Recognizing that Corporation for Public Broadcasting grants are generally unrestricted and thus assist all aspects of a station's operations (see 47 U.S.C. (Supp. IV) 396(k)(7)), Congress in essence has insisted that no portion of those grants be used for editorializing. To be sure, the stations

¹⁰ Other, even more obvious, examples come readily to mind. For example, privately employed scientists undoubtedly have the constitutional right to choose their own areas of study, but a scientist who accepts a government grant to conduct research in a certain area may be required to abide by the terms of the grant even if the government cannot demonstrate a compelling interest in obtaining research in the area it has chosen rather than in another area viewed by the scientist as more beneficial.

affected by the provisions on editorializing are not government-owned and receive only a portion of their revenue from the federal government. In addition, such stations may claim that their editorials are produced and broadcast solely with private funds. But despite these differences it seems clear that a compelling interest test is inappropriate in this context since the provision at issue does not seek to regulate private speech but rather attempts to prevent misuse of public funds.

Even where the question of misuse of public funds is much less directly involved than it is here, conditions restricting expression may be attached to the receipt of federal funds without showing a compelling need for those conditions. For example, as a condition of their compensation from the public treasury, government employees may be subjected to restrictions on off-the-job expression that would be unconstitutional if applied to other persons. A federal employee may not hold office in a political party, work at the polls, organize a political party or club, participate actively in partisan fund-raising, become a candidate or campaign for many elective offices, actively manage a partisan campaign, solicit votes for a partisan candidate, serve as a delegate to a political convention, or engage in other forms of political activity that would otherwise be protected by the First Amendment. 5 U.S.C. 7324; *CSC v. Letter Carriers*, 413 U.S. 548 (1973). In a similar vein, government contractors may not make political contributions during the life of a government contract (2 U.S.C. 441c) even though the First Amendment protects a citizen's right to contribute to a candidate or political organization (see *Buckley v. Valeo*, 424 U.S. 1, 22-23 (1976)).

In reviewing the constitutionality of restrictions imposed upon public employees' expression off the job, this Court has not applied a compelling interest test but has balanced the "interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees" (*Pickering v. Board of Education*, 391 U.S. 563, 568 (1968); see also *CSC v. Letter Carriers*, *supra*, 413 U.S. at 564). If such a balancing test is applied in this case, then the prohibition of editorializing satisfies First Amendment standards.¹¹ That prohibition

¹¹ Even if the prohibition of editorializing applied to all noncommercial broadcasting stations, the test employed by the district court would be incorrect. Because of the scarcity of broadcast frequencies (see *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388 (1969)), the government may take reasonable steps to allocate this scarce public resource fairly, even though comparable measures would not be permitted with respect to the print media or other forms of expression. For example, a broadcaster may be deprived of his license if the Federal Communications Commission determines that such an action would serve "the public interest, convenience, and necessity." 47 U.S.C. 309(a). See *FCC v. WOKO, Inc.*, 329 U.S. 223, 229 (1946). In the interest of diversifying control of the media of mass communications, the FCC may "den[y] [broadcasting] licenses to newspapers owners." *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 794 (1978). Broadcasters may be required to grant those whom they criticize the use of their facilities to reply to the attacks. Compare *Red Lion Broadcasting Co. v. FCC*, *supra* (fairness doctrine constitutional), with *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (statute providing right to reply in newspaper unconstitutional). This Court has not demanded proof of a "compelling" government interest when called upon to assess the validity of such laws, which do not seek to regulate any particular point of view but, like

serves at least two substantial government interests and does not severely restrict freedom of expression.

2.a. Both when the Public Broadcasting Act was enacted in 1967 and when 47 U.S.C. 399 was recently amended, Congress concluded that restrictions on editorializing were required to insulate public broadcasting stations from political influence and to prevent political considerations from affecting the distribution of federal funds.¹² On both occasions Congress noted that editorial policy could not help but be affected by public subsidies. As one Congressman remarked:

47 U.S.C. 399, simply attempt to keep the "market-place of ideas" (*Red Lion Broadcasting Co. v. FCC*, *supra*, 395 U.S. at 390) free of distorting influences. Rather than insisting upon proof of a compelling government interest in such circumstances, this Court has balanced the public interests sought to be served by the regulation against the restrictions placed upon broadcasters. See, e.g., *Red Lion Broadcasting Co. v. FCC*, *supra*, 395 U.S. at 386-392. Such an approach is appropriate to the provision at issue here, which seeks to allow the government to support educational and cultural broadcasting without distorting public discussion of important and controversial issues.

¹² In 1967, Congress noted that "[c]onsiderable testimony was heard that no noncommercial educational station editorializes," but nevertheless forbade editorializing "[o]ut of an abundance of caution." H.R. Rep. No. 572, 90th Cong., 1st Sess. 20 (1967). The district court failed to note the context in which the phrase "[o]ut of an abundance of caution" was used and therefore came to the incorrect conclusion that Congress believed that other provisions of the Public Broadcasting Act were sufficient to shield public broadcasters from political pressures (App. A, *infra*, 15a). Instead, however, Congress viewed the problems posed by editorializing as so significant that it prohibited editorializing even though it was not then practiced by any public broadcasting station.

I think it would be a tremendous mistake to put the pressure for editorializing * * * on [public broadcasting] stations * * *.

It occurs to me, for example, if the Des Moines Register in my own State were receiving public funds its editorial policy would be substantially different or otherwise, it would * * * no longer be relying on those Federal funds.

If it were relying on public funds, it could not speak as it does about members of Congress, members of the Iowa Legislature. * * * [It] would probably tend to pull punches. I think worse than having no editorial at all is a station that editorializes while at the same time pulling punches. I suspect there would be some subject matters that would not be covered at all or otherwise, subject matters that would be covered in a way that would not be desirable.

Hearings on H.R. 3238 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce, 97th Cong., 1st Sess. (1981) (remarks of Rep. Tauke). See also page 3, note 1, *supra*.

If public broadcasting stations were permitted to editorialize, they might well feel considerable pressure to broadcast editorials pleasing to those responsible for or able to influence the distribution of federal funds. Similarly, if publicly-funded stations became associated with particular editorial positions, it would be difficult to prevent political considerations from influencing decisions regarding the distribution of federal funds. One need only envision the political pressure that would inevitably be brought to bear if newspapers and magazines with well-known political leanings were financially dependent upon discretionary federal aid.

Congress is unquestionably experienced in such matters and most capable of assessing the degree to which the provision of public funds can cause disruptive influence. Accordingly, Congress' judgment in such areas is entitled to considerable judicial respect. See *CSC v. Letter Carriers*, *supra*, 413 U.S. at 566-567 ("[F]or many years the joint judgment of the Executive and Congress has been that to protect the rights of federal employees with respect to their jobs and their political acts and beliefs * * * '[it is necessary to proscribe] active participation in partisan political management and partisan political campaigns.' * * * [T]hat is [Congress'] current view of the matter, and we are not now in any position to dispute it.")

The district court's reasons for concluding that 47 U.S.C. 399 is not needed to insulate public broadcasters from political pressures are not reassuring. The court first relied (App. A, *infra*, 13a) upon the "modest level" of funding provided by the Corporation for Public Broadcasting. The court noted (*id.* at 12a-13a) that for the average stations affected by the provision on editorializing such grants constituted not more than approximately 25% of their operating budgets in 1977, that for no such station did that figure exceed approximately 33% of its budget, and that only 14% of appellee Pacifica's revenue was allegedly derived from Corporation for Public Broadcasting grants. The flaws in the court's reasoning are manifest. There are myriad companies, and presumably many public broadcasters, for which even a 14% decrease in net income would spell bankruptcy, and there are undoubtedly many more for which the result would be a significant curtailment of operations with the loss of jobs, salary cuts, and other un-

pleasant consequences. The government is by far the greatest single source of funding for public broadcasters, and alternative sources of funding capable of compensating for withdrawn government assistance are not available. See Carnegie Commission, *A Public Trust: The Report of the Carnegie Commission on the Future of Public Broadcasting* 93-149 (1979). Accordingly, the potential influence that the government may wield as a result of its funding decisions is substantial.¹³ In addition, the relevance of the figures cited by the court is doubtful because the availability of matching funds from the Corporation for Public Broadcasting induces private contributions. See 47 U.S.C. (Supp. IV) 396(k) (6) (B) (ii); Carnegie Commission, *supra*, at 123-127.¹⁴

The district court also suggested (App. A, *infra*, 13a) that the fear of undue government influence was "even more speculative" because of the "protec-

¹³ For example, the Carnegie Commission noted that corporations, which provide a significantly smaller amount of funds to public broadcasting stations, have "undoubtedly skewed the total schedule in the direction of cultural programs which are popular among the 'upscale' audiences that corporations prefer. Controversial drama, documentaries, public affairs, and programs for minorities must then compete for remaining discretionary money." "[E]ditorial freedom does not thrive in such circumstances." Carnegie Commission, *supra*, at 107, 105.

¹⁴ Federal agencies other than the Corporation for Public Broadcasting, such as the Departments of Education and Commerce, the National Endowment for the Arts, and the National Endowment for the Humanities, as well as state and local governments, provide substantial funding for non-commercial broadcasting stations. See Carnegie Commission, *supra*, at 101, 113. Hence, if such stations were permitted to editorialize, their incentive to express views they believe would please the government would be far greater than the district court's percentages suggest.

tive insulation" provided by the Corporation for Public Broadcasting. However, Congress had good reasons to regard that insulation as insufficient. First, although we certainly do not mean to suggest that the Corporation has not faithfully discharged its duty, it is far from clear that the structure of that body makes its use for partisan or ideological ends impossible. The Corporation is governed by a 10-person board of directors appointed to five-year terms by the President with the advice and consent of the Senate (95 Stat. 726, 47 U.S.C. 396(c)(1) and (4)), and a majority of the Board may belong to the same political party (95 Stat. 726, 47 U.S.C. 396(c)(1)). Thus, a majority of the board could seek to promote the party to which they belong. Moreover, board members from both parties might share a distaste for the minority views expressed by certain broadcasters. Second, even if the Corporation's board of directors did not pressure recipient stations, such pressure might well be exerted by the Corporation's officers or employees, who might have strong personal views on certain editorial subjects. Third, regardless of whether the Corporation in fact took broadcasters' editorial positions into account in making funding decisions, stations might believe that the Corporation would do so. Finally, the Corporation cannot insulate public broadcasters from general funding decisions made by Congress in response to unfavorable editorials.¹⁵

¹⁵ The district court relied (App. A, *infra*, 13a) upon the fact that Corporation for Public Broadcasting grants are distributed according to "objective, nondiscretionary criteria." Neutral formulas, however, obviously cannot affect the total appropriation for such grants. Perhaps more important, Congress was not unduly cynical in judging that a system of neutral laws does not always suffice to prevent partisan or

In addition, the district court relied upon the "fairness doctrine," but Congress certainly had a reasonable basis for concluding that the fairness doctrine is not adequate by itself to insulate noncommercial stations from political pressure. Despite the fairness doctrine, a group or person capable of wielding influence might well desire that a public broadcasting station take a favorable editorial position on a controversial subject. If such an editorial was broadcast, all that the fairness doctrine would require is the provision of reply time for persons with opposing points of view. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 378 (1969). Thus, proponents of a particular point of view might well believe that an editorial endorsed by a "public" television or radio station would carry far more clout than any response by a private individual or a spokesman for a private group.¹⁶

ideological bias from affecting the implementation of those laws.

In this regard, the district court cited a passage in the Carnegie Commission report that noted that the system of matching grants by which federal funds are allocated among stations "is well positioned to avoid review of program content as a condition for increased funding" (App. A, *infra*, 14a n.8, quoting Carnegie Commission, *supra*, at 124). The district court, however, failed to note the Commission's conclusion that while "the theory of a matching formula for funding public broadcasting is sound * * * [in actual practice] the purpose of [the plan]—the insulation from annual political review of the system—has been undermined." Carnegie Commission, *supra*, at 125-126.

¹⁶ At one time, all broadcasters were forbidden to editorialize. See, e.g., *In re The Mayflower Broadcasting Corp.*, 8 F.C.C. 333, 340 (1940) ("[A]s one licensed to operate in a public domain the licensee has assumed the obligation of presenting all sides of important public questions * * *. The public interest—not the private—is paramount.") In 1949,

In sum, the prohibition of editorializing serves a highly important government interest because the other safeguards upon which the district court relied are insufficient to shield publicly-funded broadcasters from political pressures. Indeed, despite all these protections, the Carnegie Commission wrote in 1979: "[W]e have heard testimony on numerous examples of federal agency interference in program content, pressures on the system from congressional and administrative sources, and a widespread apprehension in the system after experiencing what it perceived as threats to its survival." Carnegie Commission, *supra*, at 101. Far more knowledgeable than the district court about the use of political power and influence, Congress accurately assessed the need to ban editorializing by stations that receive certain federal grants, and its judgment should have been honored.

b. The prohibition of editorializing serves a second highly important government interest not discussed by the district court: it prevents the use of taxpayers' money to promote controversial private views and thus obviates potential First Amendment problems. In *Abood v. Detroit Board of Education*, 431 U.S. 209, 234-235 (1977), this Court held that citizens may not be compelled to contribute to organizations that promote ideological causes with which the contributors may not agree. This is so because "contributing to an organization for the purpose of spreading a political message," as well as refraining from making such contributions, is protected by the

the FCC supplanted this approach with the "fairness doctrine" (*Red Lion Broadcasting Co. v. FCC*, *supra*, 395 U.S. at 377). However, the Commission was there dealing with commercial stations, which of course are far less susceptible to government influence than are stations heavily dependent upon government funds.

First Amendment (431 U.S. at 234). It might therefore raise constitutional problems to collect tax money from unwilling contributors and then give it to television and radio stations for the purpose of propagandizing concerning editorial positions with which a great many taxpayers might disagree.¹⁷ This problem is magnified because of the tremendous power of the broadcast media, the scarcity of broadcast frequencies (see *Red Lion Broadcasting Co. v. FCC*, *supra*, 395 U.S. at 388), and the ironic fact that government-funded "public" television stations may be less answerable to the public than commercial stations dependent upon ratings for advertising revenue.

Thus, the use of tax dollars to subsidize editorializing by the owners of noncommercial broadcasting stations is not unlike the expenditure of large amounts of public funds to propagate the views held by persons who happen to own any other business—say, shoe stores or supermarkets. The rationality and fairness of such a scheme would certainly be open to question. As one member of Congress put it (*Hearings on H.R. 3238 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 97th Cong., 1st Sess. (1981) (remarks of Rep. Moorhead) :

¹⁷ When commercial broadcasters choose to advance their private "political, social, and economic views [they are] bounded by only two factors: first, the acceptance of a sufficient number of readers—and hence advertisers—to assure financial success; and, second, the journalistic integrity of its editors and publishers" (*Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 117 (1973) (opinion of Burger, C.J.)). In the case of noncommercial stations, the first factor may be less important. Private contributions supply only part of their budgets, and those able to make such contributions may not constitute a representative sample of the audience.

There is nothing in the First Amendment that guarantees that the Federal Government will give one person a bigger horn than somebody else for the exercise of his rights.

When we pay for public broadcasting we are giving them a tremendous voice. If they are going to be allowed to editorialize with Federal money then they have a tremendous advantage over other points of view that may be just as valid.

Congress' judgment concerning the protection of First Amendment interests in this area is entitled to respect. See *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 102-103 (1973).

3. On the other side of the balance, the restriction upon expression by noncommercial educational stations is not severe. The FCC has interpreted "editorializing" to mean only the expression of a licensee's views by its management or a management spokesman (*In re Complaint of Accuracy in Media, Inc.*, *supra*, 45 F.C.C.2d at 302). The Commission has stated (*ibid.*) that the prohibition of editorializing permits "the expression of views on public issues by employees of a noncommercial educational broadcast station in their capacity as individuals * * * provided the surrounding facts and circumstances do not indicate that such views are represented or intended as the official opinion of the licensee or its management." Therefore, 47 U.S.C. 399 allows station employees, journalists, academics, experts, and all other persons to express their views freely. Subject to the fairness doctrine, political figures may be invited to give their opinions. Any news subject may be covered in any manner. Any documentary or entertainment show may be aired. Any spokesman for any group may be permitted to speak or may be inter-

viewed by any interviewer of management's choice. In addition, the prohibition of editorializing is strictly neutral; it makes no effort to restrict only those expressions of opinion with which those in positions of authority might disagree.

Moreover, any station that finds the ban on editorializing unduly restrictive may simply decline Corporation for Public Broadcasting grants. If such grants constitute only a small percentage of a station's budget, as the district court seemed to believe (see App. A, *infra*, 12a-14a), then the burden of doing without them should not be great. If, on the other hand, the station could not continue operations without such grants, then management cannot legitimately claim the right to express its own views with public funds.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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APPENDIX A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV-79-1562-MML

LEAGUE OF WOMEN VOTERS OF CALIFORNIA,
HENRY WAXMAN and PACIFICA FOUNDATION,
PLAINTIFFS

v.

FEDERAL COMMUNICATIONS COMMISSION, DEFENDANT

[Filed Aug. 5, 1982]

ORDER GRANTING SUMMARY JUDGMENT
IN FAVOR OF PLAINTIFFS

This action presents a constitutional challenge to that portion of 47 U.S.C.A. § 399 (West Supp. 1982) ("§ 399") which prohibits certain noncommercial educational television and radio stations¹ from editorializing in their broadcasts. Before turning to the issues raised by this challenge it will be useful to set out the rather complex history of this litigation.

A milestone in the history of public broadcasting in the United States was reached with the enactment

¹ Such stations are also known as "public" broadcasting stations. The Court will use the terms "noncommercial educational" and "public" interchangeably.

of the Public Broadcasting Act of 1967, Pub. L. No. 90-129, 81 Stat. 368 (1967) (codified at 47 U.S.C. §§ 390 *et seq.*) The Act provided federal financial assistance for public broadcasting and established a non-profit, private corporation, the Corporation for Public Broadcasting ("CPB"), to oversee distribution of this funding and to assist and encourage the development of public television and radio stations in the United States. The Public Broadcasting Act also contained a provision prohibiting all public broadcasting stations from editorializing and from supporting or opposing any candidate for political office. This provision was codified at 47 U.S.C. § 399.²

The instant suit, challenging the constitutionality of § 399, was filed on April 30, 1979 against the Federal Communications Commission ("FCC"). Plaintiffs argued that prohibiting all public television and radio stations from editorializing and from supporting or opposing any political candidates violated both the First Amendment's guarantee of free speech and the Equal Protection Guarantee embodied in the Due Process Clause of the Fifth Amendment. Because this challenge presented primarily legal issues rather

² As promulgated in 1967, 47 U.S.C. § 399 provided: "No noncommercial educational broadcasting station may engage in editorializing or may support or oppose any candidate for political office." In 1973 a new subsection, § 399(b), was added to § 399. This addition which is otherwise not relevant to the present action, required the redesignation of the original § 399 as § 399(a). The new subsection was deleted in 1981 and § 399(a) was again designated as § 399. At the same time § 399 was amended as discussed below. In order to avoid confusion, the court will refer to "§ 399" in discussing the history of this case despite the fact that the statute under scrutiny was designated "§ 399(a)" throughout most of this litigation.

than factual disputes, plaintiffs were able to move for summary judgment several months after filing the complaint.

Rather than file opposition papers to this motion, the United States Department of Justice, acting as attorney for defendant, notified the Court that it would not defend the constitutionality of § 399. Plaintiffs' motion for summary judgment was continued by stipulation to enable defendant to present the matter to Congress so that it could consider the matter and take whatever action within its power it deemed proper.

On January 17, 1980 the Senate Legal Counsel, acting on behalf of the United States Senate, moved for leave to appear as *amicus curiae* in this action.³ On that same date, the Senate also noticed a motion to dismiss the complaint on the alternate grounds that this action did not present a ripe case or controversy between adverse parties and that plaintiffs had failed to exhaust mandatory administrative procedures. Plaintiffs subsequently moved to disallow the filing of the Senate's motion to dismiss. Concurrent briefing

³ Section 706(a) of the Ethics in Government Act of 1978, 2 U.S.C.A. § 288e(a) (West Supp. 1982) provides that the Senate may direct its counsel to appear as *amicus curiae* in its name in any legal action in which the powers and the responsibilities of Congress under the Constitution are placed in issue. Pursuant to this section, the Senate adopted Senate Resolution 328, directing the Senate Legal Counsel to appear in this case as *amicus curiae* in the name of the Senate. 125 Cong. Rec. S19431. Section 713(a) of the Ethics in Government Act, 2 U.S.C.A. § 288f(a) (West Supp. 1982) provides that permission to appear as *amicus curiae* under § 706 "shall be of right." Permission may be denied only on an express finding that the appearance is untimely or that standing to intervene has not been established under Art. III. *Id.*

schedules were established for these two motions as well as for the Senate's motion to appear as *amicus curiae* and oral argument of all three of the motions was heard on March 3, 1981. On March 10, 1981 the Court granted the Senate's motion for leave to appear as *amicus curiae* and denied plaintiffs' motion to disallow the filing of the Senate's motion to dismiss. The Court then granted the Senate's motion to dismiss. *League of Women Voters of California v. FCC*, 489 F. Supp. 517 (C.D.Cal. 1980). In ordering the dismissal of the action, the Court held that, in light of evidence that the FCC would not enforce § 399 and the refusal by defendant's counsel to defend the constitutionality of the statute, there was no justiciable case or controversy. As a result, the Court was without jurisdiction to decide the issues presented and dismissal was required.

Plaintiffs appealed this order of dismissal. Pending argument of the appeal, on April 9, 1981, the Department of Justice under the new Attorney General notified the Court of Appeals that it would defend the constitutionality of § 399 on behalf of defendant. The Court of Appeals remanded the action to this Court for consideration of the effect of this development. On June 18, 1981 this Court vacated its order of dismissal holding that "the Executive Branch's decision to enforce the statute has eliminated any uncertainty about the existence of an actual case or controversy." The appeal was subsequently dismissed and the Senate was granted leave to withdraw from this litigation.

Plaintiffs' original motion for summary judgment, which had been continued by stipulation pending resolution of the Senate's motion to dismiss, was thus again before the Court. Oral argument of this motion

was set for August 3, 1981 and the parties were given an opportunity to file supplemental briefs.

Several days prior to the scheduled oral argument, however, Congress amended § 399 in a significant respect. The Court, therefore, continued oral argument of the plaintiffs' motion. On August 13, 1981 the President signed the Public Broadcasting Amendments Act of 1981, Pub. L. No. 97-35, 95 Stat. 725-36 (1981). This Act limited the scope of § 399's prohibition of editorializing to apply only to those public television and radio stations which receive grants from the federal government through CPB. No change was made in that portion of § 399 which prohibited all public broadcasters from supporting or opposing any candidate for political office.⁴

The parties were given an opportunity to file supplemental papers discussing the effect of this amendment, and plaintiffs were given leave to file an amended complaint to reflect this change. In the amended complaint, filed on October 2, 1981, plaintiffs altered the scope of this litigation in an important respect by dropping their challenge to that portion of § 399 which prohibits public broadcasting stations from supporting or opposing political candidates. Plaintiffs focused their attack instead solely on the statutory ban on editorializing by public broadcasters receiving federal grants from CPB.

Defendant moved to dismiss the amended complaint specifically basing its motion to dismiss on grounds

⁴ 47 U.S.C. § 399 as amended provides: "No noncommercial educational broadcasting station which receives a grant from the Corporation [CPB] under subpart C of this part [47 U.S.C. § 396] may engage in editorializing. No noncommercial educational broadcasting station may support or oppose any candidate for political office."

identical to those raised in opposition to plaintiffs' original motion for summary judgment insofar as they were still applicable to the new complaint. In light of the long and convoluted procedural history of this case, the Court deemed plaintiffs' original motion for summary judgment to be before the Court as a motion for summary judgment on the amended complaint and treated defendant's motion to dismiss as a cross motion for summary judgment.

Oral argument of these motions was heard by this Court, the Honorable Malcolm M. Lucas, District Judge, presiding, on November 9, 1981 and taken under submission. After careful consideration of all of the papers filed and of the oral arguments of counsel, the Court grants summary judgment in favor of plaintiffs.

The material facts underlying this action are not disputed. Plaintiff League of Women Voters of California (the "League") is a non-profit, non-partisan organization incorporated in the State of California. One of the purposes of the League is to promote political responsibility through informed and active citizen participation in government. Plaintiff Henry Waxman ("Waxman") is a United States Congressman. Waxman is also a regular listener and a viewer of public radio and television.

Plaintiff Pacifica Foundation ("Pacifica") is a non-profit educational corporation which owns and operates noncommercial educational broadcasting stations in five major markets in the United States. Pacifica and its stations have received and presently receive grants from CPB and come, thus, within the scope of § 399's prohibition on editorializing.

Defendant FCC is an administrative agency created pursuant to the Communications Act of 1934, ch. 652, § 1, 48 Stat. 1064 (1934) (current version at 47

U.S.C. 151 (1976)) for the purpose of regulating radio and wire communication. The FCC is charged with executing and enforcing the provisions of the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.* (1976) which includes § 399 as amended.

This Court's order of June 18, 1981 vacating the Court's previous order of dismissal, makes clear that plaintiff Pacifica has standing to bring this action. As the Court noted in that order, Pacifica now faces "a very realistic threat of severe administrative and penal sanctions" if it violates § 399. Thus, Pacifica has a sufficient stake in the outcome of this litigation even without violating § 399 to warrant its invocation of federal court jurisdiction and to justify exercise of the Court's remedial powers on its behalf. *Babbitt v. United Farmworkers*, 442 U.S. 289, 298 99 S.Ct. 2301, 2308-09, 60 L.Ed. 2d 895 (1979); *Warth v. Seldin*, 422 U.S. 490, 498-99, 95 S.Ct. 2197, 2205, 45 L.Ed. 2d 343 (1975).

Plaintiffs League and Waxman seek no relief independent of the declaratory and injunctive relief sought by Pacifica. Thus, resolution of Pacifica's claims will effectively dispose of the claims raised by the League and Waxman. Under these circumstances, it is not necessary at this time to consider separately the question of whether the League and/or Waxman would have standing to maintain this action absent Pacifica. *Cf. Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264 n.9, 97 S.Ct. 555, 562 n.9, 50 L.Ed 2d 450 (1977) (not necessary to examine the standing of all of the plaintiffs where one plaintiff had standing to raise the legal issues presented on appeal); *Legal Aid Society of Alameda County v. Brennan*, 608 F.2d 1319, 1334 (9th Cir.

1979) (“[I]t is unnecessary to examine the standing of all appellees so long as one had standing to secure the requested relief.”)

Pacifica contends that § 399’s prohibition of editorializing by certain public television and radio stations violates both the First Amendment and the Equal Protection Clause of the Fifth Amendment. The Court will address each of these challenges in turn.

I. FIRST AMENDMENT CHALLENGE

Section 399 prohibits all editorializing by noncommercial educational television and radio stations which receive funds from CPB under 47 U.S.C. § 396 (“funded noncommercial broadcasters”). The FCC has construed § 399 as prohibiting only the “use of noncommercial educational broadcast facilities by licensees, their management or those speaking on their behalf for the propagation of the licensees’ own views on public issues. . . .” *In re Complaint of Accuracy in Media, Inc.*, 45 F.C.C. 2d 297, 302 (1974). Section 399 does not, therefore, prevent funded noncommercial broadcasters from presenting a wide range of programs containing editorial content if it is made clear that the editorials are not made on behalf of the licensee or its management. Indeed, § 399 has even been construed as permitting “the expression of views on public issues by employees of a noncommercial educational broadcast station in their capacity as individuals . . . provided the surrounding facts and circumstances do not indicate that such views are represented or intended as the official opinion of the licensee or its management.” *In re Complaint of Accuracy in Media, Inc.*, *supra*, 45 F.C.C. 2d at 302.

See also, *Walker & Salveter*, 32 Rad. Reg. 2d 839, 846 (1955).⁵

Despite this narrow construction of § 399, it cannot be denied that the ban on editorializing limits the means by which certain noncommercial licensees may participate in the debate of issues of public interest and importance and, thus, raises a serious question under the First Amendment. *Consolidated Edison Co. v. Public Service Comm.*, 447 U.S. 530, 535, 100 S.Ct. 2326, 2331-32, 65 L.Ed 2d 319 (1980). The discussion of such issues lies at the heart of the First Amendment's protections. See, *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776, 98 S.Ct. 1415-16, 55 L.Ed.2d 707 (1978); *Mills v. Alabama*, 384 U.S. 214, 218-19, 86 S.Ct. 1434, 1436-37, 16 L.Ed. 2d 484 (1966); *Thornhill v. Alabama*, 310 U.S. 88, 101-102, 60 S.Ct. 736, 744, 84 L.Ed 1093 (1940).

Courts have consistently held that statutes restricting the discussion of public issues can withstand scrutiny under the First Amendment only if they serve a compelling state interest and are narrowly tailored to that end. See, *Consolidated Edison Co. v. Public Service Comm'n*, *supra*, 447 U.S. at 535, 540-544, 100 S.Ct. n.4, 2332, 2334-2336; *First Nat'l Bank of Boston v. Bellotti*, *supra*, 435 U.S. at 786, 98 S.Ct. at 1421; *Rosen v. Port of Portland*, 641 F.2d 1243, 1246 (9th Cir. 1981); *Community-Service Broadcasting v. FCC*, 593 F.2d 1102, 1111 (D.C. Cir. 1978).

⁵ Although this interpretation of § 399 was developed in connection with the prior, broader version of § 399 set out above in footnote 1, there is no indication that the FCC will adopt a different position under the amended statute. Nor is there any indication that Congress, in amending § 399, intended to affect this interpretation.

Defendant has suggested, however, that "special," less stringent standards should be applied in this case because it involves the broadcast media. In support of this position, defendant cites the Supreme Court's statement in *FCC v. Pacifica Foundation*, 438 U.S. 726, 748, 98 S.Ct. 3026, 3039-40, 57 L.Ed. 2d 1073 (1978), that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection." This statement, however, taken out of context, is misleading. A more precise yet equally concise statement of the applicable principle is found in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386, 89 S.Ct. 1794, 1805, 23 L.Ed 2d 371 (1969) where the Supreme Court recognized that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them."

Thus, while it is true that some regulation of speech is permitted in the context of the broadcast media which would not be permitted with respect to speech communicated in some other fashion, any such result must be explicable in terms of differences in the characteristics of the broadcast media. For example, in *Pacifica Foundation, supra*, the Court upheld the FCC's power to impose informal sanctions against broadcasters of patently offensive speech on the basis of two special characteristics of the broadcast media. First, the Court noted that "because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content." *Id.*, 438 U.S. at 748, 98 S.Ct. at 3040. Second, the Court recognized the fact that "broadcasting is uniquely accessible to children." 438 U.S. at 749, 98 S.Ct. at 3040. These two special factors obviously have no relevance to consideration of the restriction on editorializing imposed

by § 399. Other characteristics of broadcast media would have to be demonstrated and shown to require the limitation here at issue.

Defendant has not brought to the Court's attention any special characteristic of the broadcast media which would justify the application of less stringent First Amendment standards in the present case. Nor is the Court aware of any such special characteristics. The Court, therefore, rejects defendants' argument that review under the First Amendment of the ban on editorializing imposed by § 399 should be less stringent simply because it arises in the context of the broadcast media. Section 399 can survive scrutiny under the First Amendment only if it meets the standard generally used in First Amendment cases, that is, that it serves a compelling government interest and is narrowly tailored to that end.

It is well established that regulations such as § 399 are presumptively unconstitutional and that the government bears the burden of justification. See *Consolidated Edison Co. v. Public Service Comm'n*, *supra*, 447 U.S. at 540, 100 S.Ct. at 2334; *Rosen v. Port of Portland*, *supra*, 641 F.2d at 1246; *Kuszynski v. City of Oakland*, 479 F.2d 1130, 1131 (9th Cir. 1973). Defendant makes two arguments in attempting to meet its burden of justifying the restrictions upon speech imposed by § 399. First, defendant contends that § 399 serves a compelling government interest in ensuring that funded noncommercial broadcasters do not become propaganda organs for the government. Second, defendant argues that § 399 serves a compelling government interest in preventing government funding from interfering with the balance presentation of opinion on funded noncommercial stations. The Court will address each of these arguments in turn.

Defendant notes correctly that during the hearings and debates which preceded passage of the Public Broadcasting Act of 1967, several members of Congress expressed concern that government funding of noncommercial broadcasters brought with it the danger of government control. See e.g., 113 Cong. Rec. 12,992 (1967) (remarks of Sen. Thurmond); 113 Cong. Rec. 26,384 (1967) (remarks of Rep. Staggers); 113 Cong. Rec. 26,394 (remarks of Rep. Brotzman).⁶ The Court agrees that the fear of government control, if justified, might constitute a compelling government interest sufficient to justify the restrictions imposed by § 399. The evidence presented, however, indicates that this fear is not justified.

There is often reason to fear that "he who pays the piper calls the tune." Yet this fear is greatly reduced, where the "piper" receives funds from many different sources. Although little competent evidence has been presented to the Court, the parties agree that CPB funding in 1977 did not constitute more than approximately 25% of the funding received by funded noncommercial broadcasters and that no broadcaster receives more than approximately 33% of its funds through CPB grants. The parties also appear to agree that many of the stations which fall within the prohibition of § 399 receive substantially less than 25% of their funds in the form of CPB funding. Pacifica, for example, alleges that it received only 14% of its total revenues from CPB

⁶ The Court notes that some legislators also expressed personal concerns about permitting public broadcasters to editorialize. This aspect of the legislative history is discussed briefly in *Community-Service Broadcasting v. FCC*, 593 F.2d 1102, 1128 n.25 (D.C. Cir. 1978). Clearly such personal interests are not legitimate government interests.

Community Service Grants in 1978. It should also be noted that Congress has recently reduced the level of fundings authorized under 47 U.S.C. § 396 for fiscal years 1984-1986. Public Broadcasting Amendments Act of 1981, Pub. L. No. 97-35, § 1227, 95 Stat. 727 (1981) (to be codified at 47 U.S.C. § 396(k)(1)(c)). Such a reduction of funds can only serve to reduce the danger of government control. In light of the modest level of government funding, the expressed fear of government manipulation of the broadcast media does not seem to be justified.

This fear appears even more speculative when one considers the numerous additional safeguards which have been built into the funding system to ensure that funded noncommercial broadcasters remain free of government control. The CPB, which disburses all funds under 47 U.S.C. § 396, is an independent, non-profit, private corporation. It was established in this form specifically "to remove the [noncommercial] programming activity from governmental supervision." H.R. Rep. No. 572, 90th Cong., 1st Sess. 19-20 (1967) *reprinted in* [1967] *U.S. Code Cong. & Ad. News* 1799, 1810. To this end, CPB is governed by an appointed Board of ten directors, no more than six of whom may be members of the same political party. 47 U.S.C.A. § 396(c)(1) (West Supp. 1982).⁷ The CPB cannot own or operate any station, network, or interconnection facility or produce, schedule or disseminate programming. 47 U.S.C.A. § 396(g)(3) (West Supp. 1982). Furthermore, funding decisions are based on objective, nondiscretionary criteria. Thus, even were the CPB not sufficiently insulated from political control, it would be

⁷ As amended by the Public Broadcasting Amendments Act of 1981, Pub.L.No. 97-35, § 1225, 95 Stat. 725-27 (1981).

difficult to manipulate funding decisions along political lines.⁸ No evidence has been presented which even suggests that CPB has failed in its statutory duty "to afford maximum protection [to public broadcasters] from extraneous interference and control." 47 U.S.C.A. § 396(a)(7) (West Supp. 1982).

Even if the CPB were ineffective in insulating funded noncommercial broadcasters from governmental influence, still another safeguard works to ensure that such broadcasters will not become mouthpieces for the government. This protection is provided by the fairness doctrine.⁹ This doctrine "imposes two affirmative responsibilities on the broadcaster: coverage of issues of public importance must be adequate and must fairly reflect differing viewpoints." *Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 111, 93 S.Ct. 2080, 2090, 36 L.Ed.2d 772 (1973). Under this doctrine a broadcast licensee cannot present one-sided political propaganda for whatever reason.

The modest level of government funding, the protective insulation of the CPB, and the restrictions of the fairness doctrine all work to ensure that funded

⁸ See, Carnegie Commission on the Future of Public Broadcasting, *A Public Trust: The Report of the Carnegie Commission on the Future of Public Broadcasting*, 124-25 (1979):

"Because eligibility for receipt of federal funds and the amount of the [grant] are determined by objective quantitative means, the system is well positioned to avoid review of program content as a condition for increased funding . . . Thus, licensees do not really 'earn' their [grants] with any specific program or service."

⁹ For a summary of the development of the fairness doctrine see *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 375-386, 89 S.Ct. 1794, 1799-1804, 23 L.Ed. 371 (1969).

noncommercial broadcasters will not be vulnerable to attempts to use them as propaganda organs for the government. Nor will funded noncommercial broadcasters be influenced to take particular editorial positions in order to curry favor with the government. Both the "stick" and the "carrot" of federal funding have been effectively eliminated.

The legislative history of § 399 confirms that Congress did not view § 399's ban on editorializing as a necessary means to a compelling end. Rather, § 399 was added out of an "abundance of caution." H.R. Rep. No. 572, 90th Cong., 1st Sess. 20 (1967) *reprinted in* [1967] *U.S. Code Cong. & Ad. News* 1799, 1810. Such prudence, while otherwise commendable, does not justify § 399's restriction on speech. The Court must, therefore, reject defendant's contention that fear of government control of funded noncommercial broadcasters presents a compelling government interest which will enable § 399's ban on editorializing to survive scrutiny under the First Amendment.

Defendant also argues that restrictions on editorializing are necessary to ensure that government funding of noncommercial broadcast stations will not interfere with the balanced presentation of opinion on those stations. This argument finds its origin in discussions held in the early years of the regulation of broadcasting. More than forty years ago, the FCC adopted a prohibition of all editorializing by broadcast stations, both commercial and noncommercial. *See In re Mayflower Broadcasting Corp.*, 8 F.C.C. 333, 339-341 (1940). This policy was reconsidered and abandoned by the FCC in 1949. In the report which led to this important policy change, the FCC discussed both the pros and cons of permitting broad-

cast licensees to editorialize. *In re Editorializing by Broadcast Licensees*, 13 F.C.C. 1246 (1949). Opponents of a change in policy argued that:

[O]vert editorialization by broadcast licensees would not be consistent with the attainment of balanced presentations since there was a danger that the institutional good will and the production resources at the disposal of broadcast licensees would inevitably influence public opinion in favor of the positions advocated in the name of the licensee and . . . having taken an open stand on behalf of one position in a given controversy, a license [*sic*] is not likely to give a fair break to the opposition.

Id., at 1253. The FCC, while not entirely disagreeing with the assumptions underlying this line of argument, did not reach the same conclusion:

If it be true that station good will and licensee prestige, where it exists, may give added weight to opinion expressed by the licensee, it does not follow that such opinion should be excluded from the air. . . . In any competition for public acceptance of ideas, the skills and resources of the proponents, and opponents will always have some measure of effect in producing the results sought. But it would not be suggested that they should be denied expression of their opinions over the air by reason of their particular assets . . . Assurance of fairness must in the final analysis be achieved, not by the exclusion of particular views because of the source of the views, or the forcefulness with which the view is expressed, but by making the microphone available for the presentation of contrary views with-

out deliberate restrictions designed to impede equally forceful presentation.

Id., at 1253-54.

Defendant contends that Congress may well have decided to prohibit editorializing by funded noncommercial broadcasters because it agreed with the position taken by the FCC prior to 1949 rather than the position adopted in 1949. Defendant appears to argue that this pre-1949 position could have appeared especially convincing to Congress because a public broadcaster's good will and institutional prestige were, in large part, "created" by federal funding and were not truly "earned." There are, however, two problems with this argument. First, there is absolutely no indication that Congress did, in fact, originally enact or amend § 399 for the reasons suggested by defendant. Second, although there is much to be said for a complete prohibition of editorializing by all broadcast licensees as a rational attempt to foster balanced broadcasting, this concern is not sufficiently compelling to justify the ban on speech imposed by § 399 under the First Amendment. The protections offered by the fairness doctrine effectively eliminate any substantial danger of "unbalanced" programming.

In sum, the Court holds that the right of funded noncommercial broadcasters to editorialize is entitled to the full panoply of First Amendment protections. There are no special characteristics of the broadcast media which justify the application of "special," less stringent First Amendment standards in this case. Defendants must therefore establish that § 399's ban on editorializing is narrowly tailored to serve a compelling government interest. Defendant has failed

to carry this burden. The fear that funded noncommercial broadcasters will become propaganda organs for the government is too speculative to provide such a compelling interest. The desire to ensure the balanced presentation of opinion by funded noncommercial broadcasters, even if it had been a motivating factor in the passage of § 399, also fails to provide a sufficiently compelling interest to justify the ban on editorializing imposed by that statute. The Court holds that § 399 violates the First Amendment insofar as it prohibits funded noncommercial broadcasters from editorializing.

II. THE FIFTH AMENDMENT CHALLENGE

Pacifica also challenges § 399 under the Equal Protection Guarantee embodied in the Due Process Clause of the Fifth Amendment. This guarantee, like the Equal Protection Clause of the Fourteenth Amendment, requires both that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives, and that any distinctions drawn between speakers must be carefully scrutinized. *Carey v. Brown*, 447 U.S. 455, 461-62, 100 S.Ct. 2286, 2290-91, 65 L.Ed. 263 (1980). See also *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 98-99, 92 S.Ct. 2286, 2291, 33 L.Ed. 212 (1972).


Pacifica argues that many noncommercial and commercial broadcasters which do not receive grants from CPB under 47 U.S.C. § 396 and which are, thus, not prohibited from editorializing by § 399 are "just as likely if not more so, to fall prey to government coercion," as are funded noncommercial broadcasters. In support of this argument Pacifica notes that many noncommercial broadcasters receive sub-

stantial federal funds through various federal sources other than CPB and that many stations broadcast federally funded advertising. The discretionary allocation of these funds, Pacifica contends, brings with it a more serious danger of government control than that raised by CPB funding. In addition, plaintiff points to the licensing process itself as a potential source of federal coercive power over all broadcasters.

Pacifica argues that because the danger of government coercion through these other means is as great "if not greater" than the danger posed by CPB funding, it is a violation of the Equal Protection Guarantee to prohibit funded noncommercial broadcasters from editorializing but not to prohibit editorializing by those stations which receive federal funds from other sources or which undergo periodic license renewal.

While this argument may well be taken, the Court has difficulty adopting it in the context of this motion for summary judgment. There is little if any competent evidence before the Court from which to draw any justifiable conclusion as to the dangers inherent in these potential sources of coercive power. It is quite possible that the dangers noted by Pacifica do exist and that they are more substantial than the minimal risk of government control posed by CBS funding. Nevertheless, on the basis of the evidence now before the Court, it is not possible to grant summary judgment in favor of Pacifica under the Equal Protection Guarantee of the Fifth Amendment.

The Court, therefore, bases its decision squarely on the First Amendment, holding that the restrictions imposed upon editorializing by funded noncom-



mercial broadcasters are not consistent with the guarantees of that amendment.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk shall serve, by United States mail, copies of this Order on counsel for all parties of record in this matter.

Dated: August 5, 1982

/s/ Malcolm M. Lucas
MALCOLM M. LUCAS
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV-79-1562-MML

LEAGUE OF WOMEN VOTERS OF CALIFORNIA,
ET AL., PLAINTIFFS,

v.

FEDERAL COMMUNICATIONS COMMISSION, DEFENDANT.

SUMMARY JUDGMENT

This cause came on to be heard on motion of plaintiffs for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The Court having considered all pleadings, memoranda, and declarations submitted herein, and having heard the arguments of counsel, and having given due deliberation to this matter,

IT IS ORDERED that plaintiffs' motion for summary judgment is hereby granted, and further

ORDERED, ADJUDGED and DECREED, that

1. The prohibition against editorializing contained in 47 U.S.C. § 399 is unconstitutional as a violation of the First Amendment to the United States Constitution, and is hereby declared null and void;

2. Defendant Federal Communications Commission and any of its agents, employees and others acting in concert with it are hereby enjoined from forc-

ing or executing the prohibition against editorializing contained in 47 U.S.C. § 399;

3. Plaintiffs shall recover their costs and reasonable attorneys' fees.

IT IS FURTHER ORDERED that the Clerk shall serve, by United States mail, copies of this Judgment on counsel for all parties in this matter.

Dated: August 5, 1982

/s/ Malcolm M. Lucas
MALCOLM M. LUCAS
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CV 79-1562-MML (PX)

LEAGUE OF WOMEN VOTERS OF CALIFORNIA, ET AL.,
PLAINTIFFS

v.

FEDERAL COMMUNICATIONS COMMISSION, DEFENDANT

NOTICE OF APPEAL TO THE SUPREME
COURT OF THE UNITED STATES

[Filed September 3, 1982]

Notice is hereby given that the Federal Communications Commission, the defendant above-named, hereby appeals to the Supreme Court of the United States from the order granting summary judgment in favor of plaintiffs entered in this action on August 6, 1982.

This appeal is taken pursuant to 28 U.S.C. § 1252.

Respectfully submitted,

J. PAUL McGRATH
Assistant Attorney General
STEPHEN S. TROTT
United States Attorney

/s/ Paul Blankenstein
PAUL BLANKENSTEIN

/s/ Judith F. Ledbetter
JUDITH F. LEDBETTER
Attorneys, Department of Justice
Civil Division, Room 3537
10th & Pennsylvania Ave., N.W.
Washington, D.C. 20530
Attorneys for Defendant

DATED: September 2, 1982

No. 82-912

In the Supreme Court of the United States
OCTOBER TERM, 1982



FEDERAL COMMUNICATIONS COMMISSION, APPELLANT

v.

LEAGUE OF WOMEN VOTERS OF CALIFORNIA, ET AL.

*ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA*

JOINT APPENDIX

FREDRIC D. WOOCHEER
LUCAS GUTTENTAG
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**APPEAL DOCKETED: DECEMBER 1, 1982
FURTHER QUESTION OF JURISDICTION POSTPONED
TO HEARING OF THE CASE ON THE MERITS:
February 28, 1983**

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LEAGUE OF WOMEN VOTERS OF CALIFORNIA,
HENRY WAXMAN; PACIFICA FOUNDATION, PLAINTIFFS
FEDERAL COMMUNICATIONS COMMISSION, DEFENDANT

No. 79-1562

DATE	NR.	PROCEEDINGS
4/30/79	pg	1. Fld complt. Issd summs. Case maybe ref to Mag. Penne. 2. Fld Req & Ord for svc of proc by other than the USM, namng Alletta d'A Belin.
6-13-79	dg	3. Fld rtn of sms, servd FCC on 4-30-79
6-29-79	dg	4. Fld Stip & ORD ext ti for dft to ans complt to 7-30-79
7-30-79	gll	5. Fld deft's ANSWER TO COMPLAINT.
7-30-79	gll	6. Fld ORD (MML) re early meeting; mand stat conf 11-5-79, 10 am.
8-24-79	gll	7. Fld stip re joint stat rpt.
8-27-79	gll	LODGED pltf's prop 1st A/C. LODGED pltf's prop ord.
8-28-79	gll	8. Fld ORD (MML) that purs to stip fld 8-24-79 pltf's may file amd complt. 9. Fld pltf's FIRST AMENDEE COMPLAINT
9-12-79	lf	10. Fld deft's ANSWER TO FIRST AMENDED COMPLT
9-24-79	rlb	11. Fld plfs' ntc of Mot & mot, rtnbl 11/5/79, 10 am, for S/J. 12. Fld plfs' memo of P/As in suppt mot for S/J. 13. Fld affd of Waxman in suppt Mot for S/J. LODGED plfs' proposed finds of fact & concl of law.—PLACED IN FILE, NOT USED LODGED plfs' proposed S/J—PLACED IN FILE, NOT USED
*9-19-79	yd	14. Fld Stip & ORD re time for flng pltf's S/J mot
10-23-79	yd	15. Fld Stip & ORD ext ti to 11-15-79 for deft to resp to pltf's mot for S/J; plts shall fle their reply no latr than 11-26-79; matt'r rescheduld for hrg 12-3-79
11-16-79	yd	16. Fld Stip & ORD ext ti for deft to resp to pltf's motn for S/J to 1-18-80; plts shall fle reply no latr than 1-28-80 & if Crt approves that this matt'r be rescheduled for hrg on 2-4-80, 10AM
1-17-80	yd	17. Fld note of Senate's motn to appear as Amicus Curiae retnbl 2-4-80, 10 AM

	yd	18. Fld memo in suppt of Senate's motn to dismiss
	yd	19. Fld note of Senate's motn to dismiss retnbl 2-4-80, 10AM
	yd	20. Fld note of Senate's motn to defer resp to motn for S/J retnbl 2-4-80, 10AM
	yd	LODGED prop ORD—PLACED IN FILE, NOT USED
1-18-80	yd	21. Fld deft's resp to pltfs' motn for S/J
1-28-80	yd	22. Fld US Senate's aff of srvc of cpy of Senate's note of motn & motn to appear as amicus curiae & supptng memo; Senate's note of motn & motn to dismiss & supptng memo; Senate's note of motn & motn to defer to pltfs' motn for S/J prop Ord submitted by Senate
	yd	23. Fld US Senate's note of app of Michael Davidson & Charles Tiefer as cnsl for US Senate in case
1-29-80	yd	24. Fld Stip & ORD that ti for pltfs & deft to resp to Amicus applicant Senate's motns to appear as Amicus Curiae & to dismiss case ext to 2-11-80; Senate shall file reply no later than 2-21-80 & these motns reschedule for hrg on 3-3-80
2-13-80	yd	25. Fld deft's resp to Senate's motn to appear as Amicus Curiae & motn to dismiss
	yd	26. Fld pltfs note of motn & motn ti disallow Senate's motn to dismiss retnbl 3-3-80, 10AM
	yd	27. Fld pltfs memo in suppt of pltfs' motn to disallow filing of Senate's motn to dismiss
	yd	28. Fld pltfs memo of nonopp to Senate's motn to appear as Amicus Curiae
	yd	29. Fld pltfs memo in opp to Senate's motn to dismiss; declaratns of Joel Kugelmass, Susan F. Rice; Henry A. Waxman in suppt
2-25-80	lf	30 Fld senate reply in supp of mtn to dismiss 31 Fld aff of serv of reply of senate in supp of mtn 32 Fld Senate's memo in reply to pltfs memo of nonoppos to mtn to appear as amicus & in oppos to mtn to disallow filing of Senate's mtn to dismiss
2-27-80	yd	33. Fld pltfs' reply in suppt of motn to disallow Senate's motn to dismiss
3-3-80	yd	34. MIN ORD: US Senate's motn to appear as Amicus Curiae is GRANTED. Crt allows filing of Senate's motn to dismiss. Motn to dismiss is argued to Crt & Crt takes motn to dismiss under submissn

3-7-80	yd	35. Fld Movant to Appear as Amicus Curiae suppl memo on O'Hair v. United States
	yd	36. Fld Movant to Appear as Amicus Curiae aff of srvc of cpy of Senate's suppl memo on O'Hair v. United States on 3-6-80
3-10-80	yd	37. Fld ORD granting US Senate's motn to appear Amicus Curiae, denying pltf's motn to disallow filing of Senate's motn to dismiss & granting Senate's motn to dismiss actn (ENT 3-11-80) Mld cpys & Note
3-14-80	yd	38. Fld pltf's note of resetting prev noted motn for S/J retnbl 4-7-80, 10AM
4/24/80	fb	39. Fld pltf's NOTICE OF APPEAL to the 9th Cir. C/A fr ord ent on 3/11/80. \$65.00 docket fee paid.
5-2-80	srl	40. Fld pltf's reports trans designtn
8-4-80	kt	41. Fld pltf's designtn of clk's recrd on appeal
1-26-81	cg	42. Fld pltf's designation of clk's recd
2/17/81	rz	43. Fld amicus curiae design of clk's record
3/25/81	fb	—Issd & fwd to C/A lcc of Clk's rec on appeal.
4/13/81	rz	44. MIN ORD: ORDS that the ord of rem issd by 9CCA on 4/10/81 is set fr filing & spreading upon the rec of this crt on 4/17/81, 9:30 AM. ORD that cnsl to prepar written status rpts to be fi in this crt by 4/16/81, 4PM
4/13/81	rz	45. Recvd fm 9CCA cpy of ord of rem to dist crt fr 56 dys.
4/16/81	rlb	46. Fld plf's status report.
		47. Fld def't's status report.
4/29/81	rlb	48. MIN ORD: Fling & Spreading: ORD the ORD of REmand of the USCCA remanding act to USDC for fur action be & is fld & spread. (Ent 4/30/81) Made REopening JS-5
5-7-81	sb	49. Rec'd cpy C/A ord ex & motn for clarification granted to 6-22-
5-19-81	sb	50. Fld def't's memo on remand from crt of appeal re jurisdiction
5/21/81	lp	51. MIN ORD: Crt on its own mot, ORDS that Ord of USCA for 9th cir fld 4/30/81, extending the tim of remand to 6/22/81, be & hereby is fld & spread upon the recrd of crt. (ENT 5/22/81)
5-29-81	sb	52. Fld pltf's memo on remand from the crt on appeal re jurisdictn
6-1-81	sb	53. Fld motn of Senate to w/draw
	sb	54. Fld memo of Senate in suppt of motn to w/draw

6-8-81	sb	55. MINORD: crt grant US Senate motn to w/draw from the case, crt takes question of jurisdctn under submission
6-18-81	sb	56. Fld ORD (MML) Vacating dism & setting briefing schedule
7-13-81	sb	57. Fld pltf's supplemntal memo of P/A in suppt of motn fr S/J
7-22-81	sb	58. Fld deft's statmnt of genuine issve of material fact 59. Fld deft;s memo of P/A in opp to pltf motn fr S/J
7-27-81	sb	60. Fld pltf's reply memo of P/A in suppt of motn fr S/J
7-28-81	sb	61. Fld pltf's addendum to pltf reply to memo of P/A in suppt of suppt of motn fr S/J
8-3-81	sb	62. MIN ORD: pltf motnfr S/J cont to 9-28-81 10am pltf supplemntal motn before 8-24-81 opp NLT 2wks
8-12-81	sb	63. Fld pltf's Stip & Ord (MML) pltf openinf brief due 8-28- deft's resp 9-15 pltf reply 9-22-81 Crt hrg on 9-28-81
8-10-81	sb	64. Lodged copy of jugh fr C/A that appeal dismissed
8/18/81	jcd	65. MIN ORD: Flg & Spreading of Mandate frm USCCA, 9th Circ. ORD that the Mandate frm USCA, 9th Circ Dsmng the appeal, w/o prej, is fld & Spread upon the recs of this Dist Crt. (ENT 8/20/81)
8-31-81	sb	66. FLD pltf's 2nd memo of P/A in suppt of motn fr S/J
9-15-81	sb	67. Fld deft supplemental memo on amendment of Section 399
9-23-81	sb	68. Flô Ord cont oral arg on pltf motn fr S.J until 11-9-81 & Granting pltf lv to file amended complt (MML) 69. Fld pltf second reply to memo of P.A in suppt of motn fr S/J
10-2-81	sb	64. Fldpltf SECOND AMENDED COMPLT fr declaratory & injuntive relief against enforcement of 47 U.S.C. § 399
10-2-81	sb	65. Fld pltf note of filing second amende complt prop S/J amende prop finding of fact & cocncl of law retbel 11-23-81 10am hrg

66. Fld pltf delcar of Jim Berland
 LODGED AMENDED PROP S/J
 LODGED AMENDED pro finding of fact & con cl of
 law

10-13-81	sb	67. Fld deft memo in suppt of motn to dism the second amended complt 68. Fld deft note of motn & motn to dism 11-9-81 10am
10-26-81	sb	69. Fld pltf memo in opp to deft motn to dism 70. Fld pltf notecof change of address
11-9-81	sb	71. MIN ORD: dfet motn to dism 2nd A/C pltf motn fr S/J under submission
8/5/82	rlb	72. FLD ORD GRANTING S?J in fv plf. (Ent 8/6/82 m/cpys & ntfd prtys) 73. Fld SUMMARY JUDGMENT & ORD thereon that plfs' Mot for S/J is GRANTED & Fur ORD the prohibition agnst editorializing contained in 47 USC 399 is unconstitutional as a viol of the 1st amendment to US constitution & is hereby declared null & void; dft FCC, etc are enjoined frm forcing or execution the prohibition agnst editorializing contained In 47 USC 399; plfs shall rcvr costs & reasonable attys fees. (Ent 8/6/82 m/cpys & ntfd prtys)
8/27/82	gth	74. Fld stip & ORD (MML) that defts motn to altr or amd jdmt be cont to 11/1/82. Fur plts respons shall be fld & srvd on defts cnsl by express mail no later than 10/1/82. Defts reply shall be fld & srvd on plts cnsl by express mail no later than 10/20/82
*8/18/82	gth	75. Fld deft's note of motn to alter or amd jdmt retnbl 9/20/82, 10
9/3/82	am	76. Fld deft's NOTC OF APPEAL to Supreme Ct frm ord ent 8/6/82.
9/7/82	gth	77. Fld pltf's applic for awrd of costs & reasonabl attys fees; memo of P&As in suppt thereof; declaratns of Fredric D. Woocher, Carlyle W. Hall, Francis M. Wheat, Nancy L. Jones, Mary Jane Merrill, Henry A. Waxman, & Sharon Maeda
10/4/82	gth	77. Fld ptlf's memo in opp to deft's motn to altr or amd jdmt
10/22/82	gth	78. Fld deft's reply brief in suppt of its motn to altr or amd jdmt

- 11/1/82 gth 79. MIN ORD: Crt ORD previous awrd of atty fees is strickn frm jdmt. Pltfs opp to deft motn to amd jdmt is deemd a motn for atty fees & deft's motn to amd jdmt is deemd opp to a motn for atty fees. Motn for an awrd of attys fees is arg to Crt. Crt taks motn undr submissn
- 11/12/82 gth 80. Fld stip & ORD (MRP) that ti for pltfs to respnd to dfets 1st req for prod of docs & defts 1st set of interrogs shall be cont 30 days aftr this Crt rules on pltfs motn for an awrd of costs & reasonabl attys fees
- *10/20/82 gth 81. Fld defts ex parte applic & ORD (MML) that ti for deft to file be extended to 10/24/82.
- 12/13/82 kmb 82. Fld pltfs' submissn of additnl authority re pltfs' motn for award of costs & reasonable attys' fees.
- 12/27/82 wa 83. Fld pltfs subm of addit'l authrty re pltfs' mot for award of costs & reasonable attys' fes.
- 3-3-83 kmb LODGED cc of ord fm Supreme Crt: Consideratn of the questn of jrsdctn is postpond to the hrg on the case on the merits.

FREDRIC D. WOOCHEE
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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
 FOR THE CENTRAL DISTRICT OF CALIFORNIA

Civ. No. 79-1562 MML (Px)

LEAGUE OF WOMEN VOTERS OF CALIFORNIA;
 HENRY WAXMAN; PACIFICA FOUNDATION, PLAINTIFFS

v.

FEDERAL COMMUNICATIONS COMMISSION, DEFENDANT

SECOND AMENDED COMPLAINT FOR DECLARATORY
 AND INJUNCTIVE RELIEF AGAINST ENFORCEMENT
 OF 47 U.S.C. § 399

I. INTRODUCTION

1. This is an action to invalidate, and enjoin the enforcement of, the prohibition against editorializing contained in 47 U.S.C. § 399, as amended by § 1229 of the Public Broadcasting Amendments Act of 1981, Pub. L. No. 97-35, 95 Stat. 730. Section 399, as amended, provides: "No non-commercial educational broadcasting station which receives a grant from the Corporation [for Public Broadcasting] under subpart C of this part [47 U.S.C. § 396] may engage in editorializing. No noncommercial educational broadcasting station may support or oppose any candidate for political office." Plaintiffs, a citizens' organization founded to promote political responsibility through informed and active participation of citizens in government, an individual listener and viewer of noncommercial programming, and a chain of noncommercial broadcasting stations, challenge § 399's ban on editorializing as violating the First and Fifth Amendments to the United States Constitution.

II. JURISDICTION AND RELATED MATTERS

2. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1331(a) since this action arises under the Constitution and laws of the United States. Because this action is brought against the Federal Communications Commission, an agency of the United States, no amount in controversy need be shown.

3. The jurisdiction of this Court is also invoked pursuant to the provisions of 28 U.S.C. §§ 2201, 2202, as this action seeks a declaration of the rights of plaintiffs under 47 U.S.C. § 399 and the First and Fifth Amendments to the United States Constitution.

III. PARTIES

4. Plaintiff League of Women Voters of California (hereinafter "League") is a non-profit non-partisan organization incorporated in the State of California. It has approximately 13,000 members in 80 local chapters in California. The purpose of the League is to promote political responsibility through informed and active participation of citizens in government. Its principles include a belief in representative government and in the individual liberties established in the United States Constitution, and a conviction that democratic government depends upon the active participation of a knowledgeable citizenry. The League's objective of educating the electorate is illustrated by its pamphlets and by its sponsorship of political debates, including the televised California gubernatorial debates of 1978 and local "candidate nights" in which those seeking public office are presented to voters. The League also analyzes election ballot measures and presents the issues to voters both in written form and through the broadcast media. In addition, the League takes positions on selected issues and ballot measures after its members have studied and come to agreement. To disseminate its views, the League often seeks out broadcast editorials favorable to its position, or seeks to reply to editorials opposing its viewpoint. If noncommercial broadcasters were not prohibited by 47 U.S.C. § 399 from engaging in editorializing, the League would seek their editorial support just as it has done with commercial broad-

casters. And if noncommercial broadcasting stations were to broadcast editorials, the League's members would listen to such editorials.

5. Plaintiff Henry Waxman, suing in his individual capacity, is the United States Congressman representing the 24th Congressional District in California, which includes portions of the City of Los Angeles and the unincorporated area of Los Angeles County. From December 1975, to January 1979, plaintiff Waxman was a member of the Communications Subcommittee of the House Committee on Interstate and Foreign Commerce (hereinafter "subcommittee"). In his capacity as a member of that subcommittee, he actively participated in deliberations on the Public Telecommunications Financing Act of 1978 (H.R. 12605), and proposed as a section of that Act, an amendment to the Federal Communications Code which would have abolished the prohibition on editorializing by noncommercial broadcasters contained in 47 U.S.C. § 399. Plaintiff Waxman is also a regular listener and viewer of noncommercial radio and television broadcasts. Plaintiff Waxman has in the past and continues to desire to hear the editorial opinions of noncommercial broadcasting stations, yet he has been denied access to such opinions because of the prohibition on editorializing contained in 47 U.S.C. § 399.

6. Plaintiff Pacifica Foundation (hereinafter "Pacifica") is a non-profit educational corporation which owns and operates noncommercial FM radio stations in five major markets in the United States: Los Angeles (KPFK), Berkeley (KPFA, KPFB), Houston (KPFT), Washington, D.C. (WPFW), and New York (WBAI). From the inception of the Community Service Grant program, Pacifica has received funds from the Corporation for Public Broadcasting, and each of its stations currently receives, and anticipates that it will continue to receive, a grant from the Corporation under subpart C of Part IV of the Federal Communications Act of 1934. Hence Pacifica and each of its stations are prohibited from editorializing pursuant to 47 U.S.C. § 399. Established in 1946, Pacifica now has over 50,000 listener-sponsors and 400,000 listeners weekly. One out of five Americans is within range of Pacifica broadcasts.

Pacifica was established, *inter alia*, to promote the full distribution of public information and the study of political and economic problems, to aid creative activities serving the cultural welfare of the communities it serves, and to provide accurate, objective, comprehensive news on all matters vitally affecting the communities. The ability to provide an arena for in-depth inquiry and discussion of a wide range of ideas is fundamental to Pacifica's achievement of these objectives. Were it not for the prohibition against editorializing contained in 47 U.S.C. § 399, Pacifica would broadcast its views on various important public issues, and would clearly label those views as being editorials broadcast on behalf of the Pacifica management.

7. Defendant Federal Communications Commission (hereinafter "Commission" or "FCC") is an administrative agency created pursuant to 47 U.S.C. § 151 for the purpose of regulating radio and wire communication. The Commission is charged with executing and enforcing the provisions of the Federal Communications Act, 47 U.S.C. §§ 151 *et seq.*, including 47 U.S.C. § 399.

IV. FIRST CAUSE OF ACTION

8. 47 U.S.C. § 399's prohibition against editorializing is unconstitutional on its face and as applied to plaintiffs in that it violates plaintiffs' rights to freedom of speech and the press under the First Amendment to the United States Constitution by denying noncommercial educational broadcasting stations which receive a grant from the Corporation for Public Broadcasting the right to editorialize and by denying members of the broadcast audience access to such editorials.

9. Plaintiffs League of Women Voters of California, Henry Waxman, and Pacifica Foundation are irreparably injured by 47 U.S.C. § 399 and have no adequate remedy at law available to them, in that unless this Court grants the relief requested, the FCC will continue to enforce § 399, thereby violating plaintiffs' constitutional rights.

V. SECOND CAUSE OF ACTION

10. 47 U.S.C. § 399's prohibition against editorializing is unconstitutional on its face and as applied to plaintiff

Pacifica in that it violates Pacifica's right to equal protection of the laws under the due process clause of the Fifth Amendment to the United States Constitution by depriving noncommercial educational broadcasting stations which receive a grant from the Corporation for Public Broadcasting of constitutional rights which are exercised by other noncommercial and commercial broadcasters.

11. Plaintiff Pacifica is irreparably injured by 47 U.S.C. § 399 and has no adequate remedy at law available to it in that unless this Court grants the relief requested, the FCC will continue to enforce § 399, thereby violating plaintiffs' constitutional rights.

VI. PRAYER FOR RELIEF

Plaintiffs pray for the following relief:

1. For a judgment declaring that the prohibition against editorializing contained in 47 U.S.C. § 399, as amended by § 1229 of the Public Broadcasting Amendments Act of 1981, Pub. L. No. 97-35, 95 Stat. 730, is invalid as a violation of the First and Fifth Amendments to the Constitution of the United States;

2. For an order enjoining defendant, its attorneys, agents, employees, and all others acting in concert with it from enforcing or executing the ban on editorializing contained in 47 U.S.C. § 399;

3. For costs and reasonable attorneys' fees; and

4. For such other further relief as this Court may deem just and proper.

DATED: October 2, 1981

FREDRIC D. WOOCHEER
LUCAS GUTTENTAG
JOHN R. PHILLIPS
CENTER FOR LAW IN THE
PUBLIC INTEREST

/s/ _____
FREDRIC D. WOOCHEER

/s/ _____
LUCAS GUTTENTAG
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil Minutes—General

Case No. CV79-1562-MML

Date November 1, 1982

LEAGUE OF WOMEN VOTERS, ET AL.

v.

F.C.C.

PRESENT:

HON. MALCOLM M. LUCAS, JUDGE

DUANE HOSTETTER

Deputy Clerk

DON MEHLER

Court Reporter

ATTORNEYS PRESENT

FOR PLAINTIFFS:

FREDRIC WOOCHEER

ATTORNEYS PRESENT

FOR DEFENDANTS:

JUDITH LEDBETTER, USDJ

PROCEEDINGS:

Counsel are present. The Court Orders that its previous award of attorney fees is stricken from the judgment. Plaintiffs' opposition to the defendant motion to amend judgment is deemed a motion for attorney fees and the defendant's motion to amend the judgment is deemed the opposition to a motion for attorney fees.

The motion for an award of attorney fees is argued to the Court. The Court takes the motion under submission.

Initials of Deputy Clerk
[illegible]

[October 11, 1979]

Tel: 633-3495

PB: KOlesker:bgg

82-12C-69

Honorable Robert C. Byrd

Senate Majority Leader

United States Senate

Washington, D.C. 20510

Dear Senator Byrd:

In *League of Women Voters of California, et al. v. Federal Communications Commission* (C.D. Cal., No. CV79-1562-MML (PX)), the plaintiffs challenge, on First and Fifth Amendment grounds, the constitutionality of Section 399(a) of the Public Broadcasting Act of 1967, 47 U.S.C. §399(a), which prohibits all public broadcasting stations from editorializing and supporting or opposing political candidates. I wish to inform the Senate that the United States will not defend the constitutionality of the statute.

After careful consideration, we have concluded that Section 399(a) violates the First Amendment guarantees of freedom of speech and freedom of the press by restricting the ability of public broadcasting stations to comment on matters of public interest. While not every restriction on expression is necessarily unconstitutional, such restrictions must serve some compelling state interest. We have not been able to identify any compelling governmental interest served by Section 399(a) which would justify the statute's prior restraint on speech. Furthermore, even if the Department of Justice could fashion an argument that the statute serves a compelling government interest, the statute would still be constitutionally defective on grounds of overbreadth since public broadcasting stations receiving no federal funds are covered. Finally, we have concluded that there are less restrictive means to achieve the suggested purposes of the statute.

The Department of Justice is, of course, fully mindful of its duty to support the laws enacted by Congress. Here, however, the Department has determined, after careful study and deliberation, that reasonable arguments cannot

be advanced to defend the challenged statute. The Federal Communications Commission has informed us that it agrees that the statute cannot be defended successfully in its present form.

The Department has filed an Answer to Plaintiffs' Complaint to protect your interests should you decide to defend this suit, and the Court has established a briefing schedule. If the Department can be of further assistance to you in explicating the reasons for declining to defend this case or if you or your staff believe it would be helpful to discuss the options that the Senate may wish to pursue, Thomas S. Martin, Deputy Assistant Attorney General, Civil Division, will be pleased to discuss the matter further. He can be reached at 633-3309.

Sincerely,

BENJAMIN R. CIVILETTI
Attorney General

OFFICE OF THE ATTORNEY GENERAL

Washington, D.C. 20530

April 6, 1981

Honorable Strom Thurmond

Chairman

Committee on the Judiciary

United States Senate

Washington, D.C. 20510

Honorable Joseph R. Biden, Jr.

Committee on the Judiciary

United States Senate

Washington, D.C. 20510

Dear Mr. Chairman and Senator Biden:

I am pleased to respond to your letter of February 3, 1981, requesting that I reconsider the decision of the Department of Justice not to defend the constitutionality of 47 U.S.C. § 399(a) in the case of *League of Women Voters v. FCC*, No. 80-5333 (9th Circuit). Please forgive the delay in responding, but we have undertaken a thorough review of the question. I have determined that the Department will participate in the litigation and defend the statute.

The Department appropriately refuses to defend an Act of Congress only in the rare case when the statute either infringes on the constitutional power of the Executive or when prior precedent overwhelmingly indicates that the statute is invalid. In my view, the Department has the duty to defend an Act of Congress whenever a reasonable argument can be made in its support, even if the Attorney General and the lawyers examining the case conclude that the argument may ultimately be unsuccessful in the courts.

The prior decision not to defend § 399(a) was made by virtue of the conclusion that no reasonable defense of the constitutionality of this provision as a whole could be made. Under applicable Supreme Court precedent, however, even a statute that could have some impermissible applications will not be declared unconstitutional as a whole unless the provision is substantially overbroad and no limiting construction of the language of the statute is possible. Here, for example, the statute's application to political endorse-

ments by government-owned broadcasters might well be held by a court to be constitutional. In that event, the fact that the statute permissibly could be applied in some instances may be sufficient to preclude a finding that the provision as a whole is unconstitutional.

Accordingly, we will advise the Ninth Circuit of our position and request that the case be remanded to the District Court to allow us to present our defense.

Sincerely,

/s/

WILLIAM FRENCH SMITH
Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

LEAGUE OF WOMEN VOTERS OF CALIFORNIA, ET AL.,
PLAINTIFFS,

v.

FEDERAL COMMUNICATIONS COMMISSION, DEFENDANT

No. CV 79-1562—
MML(PX).

NOTICE OF DEFENDANT'S MOTION
TO ALTER OR AMEND JUDGMENT

Hearing: September 20, 1982 10:00 a.m.

TO THE ABOVE-NAMED PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on September 20, 1982, at 10:00 a.m., or as soon thereafter as defendant may be heard, defendant will bring on for hearing before the Honorable Malcolm M. Lucas, its Motion to Alter or Amend Judgment pursuant to Rule 59(e), Fed. R. Civ. Pro., on the ground that the award to plaintiffs of reasonable attorneys' fees is barred by sovereign immunity because the award was not made in accord with the procedures or limitations of the Equal Access to Justice Act, 28 U.S.C. § 2412. This motion is supported by a memorandum of points and authorities.

Dated: August 16, 1982

Respectfully submitted

J. PAUL MCGRATH
Assistant Attorney General

STEPHEN S. TROTT
United States Attorney

STEPHEN D. PETERSEN
Assistant United States Attorney

/s/ PAUL BLANKENSTEIN
PAUL BLANKENSTEIN

/s/ JUDITH F. LEDBETTER
JUDITH F. LEDBETTER

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In the Supreme Court of the United States

No. 82-912

FEDERAL COMMUNICATIONS COMMISSION, APPELLANT.

v.

LEAGUE OF WOMEN VOTERS OF CALIFORNIA, ET AL.

APPEAL from the United States District Court for the Central District of California.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.

February 28, 1983

JAN 25 1983

ALEXANDER L. STEVAS,
CLERK

No. 82-912

IN THE

Supreme Court of the United States

October Term, 1982

FEDERAL COMMUNICATIONS COMMISSION,

Appellant,

vs.

LEAGUE OF WOMEN VOTERS OF CALIFORNIA, PACIFICA
FOUNDATION, HENRY A. WAXMAN,

Appellees.

On Appeal From the United States
District Court for the Central District of California

MOTION TO DISMISS OR AFFIRM

FREDRIC D. WOCHER

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MARILYN O. TESAURO

CARLYLE W. HALL, JR.

JOHN R. PHILLIPS

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No. 82-912

IN THE

Supreme Court of the United States

October Term, 1982

FEDERAL COMMUNICATIONS COMMISSION,

Appellant,

vs.

LEAGUE OF WOMEN VOTERS OF CALIFORNIA, PACIFICA
FOUNDATION, HENRY A. WAXMAN,

Appellees.

On Appeal From the United States
District Court for the Central District of California

MOTION TO DISMISS OR AFFIRM

Appellees League of Women Voters of California, Pacifica Foundation, and Henry Waxman respectfully move to dismiss the appeal herein or, in the alternative, to affirm the judgment of the United States District Court for the Central District of California, on the grounds that the appeal has not been timely taken and that the question on which the decision of the cause depends is so unsubstantial as not to need further argument.

OPINION BELOW

The opinion of the District Court is reported at 547 F.Supp. 379 (C.D. Cal. 1982) and is reprinted in Appendix A to the Jurisdictional Statement (J.S. App. 1a-20a).

QUESTIONS PRESENTED

1. Whether a notice of appeal, filed after entry of the District Court's judgment but while appellant's motion to alter or amend the judgment pursuant to Fed. Rule Civ. Proc. 59 remained pending in the District Court, is valid.

2. Whether the District Court correctly applied established precedents in ruling that 47 U.S.C. § 399, which completely prohibits editorializing by noncommercial educational broadcasting stations that receive grants from the Corporation for Public Broadcasting, violates the First Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution provides in pertinent part:

Congress shall make no law . . . abridging the freedom of speech, or of the press

2. 47 U.S.C. § 399, as amended by the Public Broadcasting Amendments Act of 1981, Section 1229, Pub. L. No. 97-35, 95 Stat. 730, provides:

No noncommercial educational broadcasting station which receives a grant from the Corporation [for Public Broadcasting] under subpart C of this part may engage in editorializing. No noncommercial educational broadcasting station may support or oppose any candidate for political office.

3. Supreme Court Rule 11.3 (1980 revision) provides: The time for filing the notice of appeal runs from the date the judgment or decree sought to be reviewed is

rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a petition for rehearing is timely filed by any party in the case, the time for filing the notice of appeal for all parties (whether or not they requested rehearing or joined in the petition for rehearing, or whether or not the petition for rehearing relates to an issue the other parties would raise) runs from the date of the denial of rehearing or the entry of a subsequent judgment.

STATEMENT OF THE CASE

Appellees brought this lawsuit to vindicate their respective First Amendment rights to express and to receive the views of noncommercial broadcasters on issues of public interest and importance.¹ The District Court agreed that those fundamental rights are directly and unjustifiably violated by 47 U.S.C. § 399, which completely prohibits editorializing by noncommercial educational broadcasting stations that receive grants from the Corporation for Public Broadcasting. As the court found, § 399 outlaws speech that lies at the very heart of the First Amendment's protections, and the government interests purportedly served by the statute are far too speculative to support such an unprecedented abridgment of the Constitution's guarantees of freedom of speech and freedom of the press.

¹ Appellee Pacifica Foundation is a non-profit, educational corporation which owns and operates noncommercial educational broadcasting stations in five major markets in the United States. Appellee League of Women Voters of California is a non-profit, non-partisan organization whose purpose is to promote political responsibility through the informed and active participation of citizens in government. Appellee Henry Waxman is a United States Congressman and is a regular listener and viewer of noncommercial radio and television broadcasts. J.S. App. 6a.

Statutory Background

Significant federal funding of noncommercial broadcasting began with the Educational Television Facilities Act of 1962, Pub. L. No. 87-447, 76 Stat. 64, which authorized the former Department of Health, Education & Welfare ("HEW") to distribute \$32 million over a five-year period for the construction of educational television broadcasting facilities. An additional infusion of federal monies followed in 1967 when Congress, buoyed by the success of the Facilities Act and wanting to aid the further development of the promising noncommercial broadcasting industry, enacted the Public Broadcasting Act of 1967, Pub. L. No. 90-129, 81 Stat. 368 (codified at 47 U.S.C. §§ 390 et seq.). The Act had three separate components: Title I authorized appropriations of \$38 million over the next three years to continue HEW's program of construction and acquisition grants begun under the Facilities Act, expanding it to include noncommercial radio broadcast facilities, as well; Title II authorized \$9 million for the creation of a mechanism to provide much-needed funding for cultural and educational programming so that the new noncommercial broadcasting facilities could be productively utilized; and Title III authorized \$500,000 to finance a study of instructional television to be conducted by HEW.

In establishing a comprehensive framework for the funding of educational programs, Congress took pains to ensure that there would be no government interference with programming decisions and that local stations would remain absolutely free to determine for themselves what they should or should not broadcast. S. Rep. No. 222, 90th Cong., 1st Sess. 11, *reprinted in* [1967] U.S. Code Cong. & Ad. News 1772, 1782. Accordingly, the Act created the Corporation for Public Broadcasting ("CPB"), an independent, non-profit private corporation, to disburse federal and other

funds to local stations and other entities for the production and/or acquisition of educational programming. In this manner, Congress was able "to facilitate the development of public telecommunications and to afford maximum protection from extraneous interference and control." 47 U.S.C. § 396(a)(7).

To guarantee CPB's insulation from government supervision and control, Congress erected numerous barriers to any potential political influences and promulgated strict limitations on permissible CPB activities. For example, the Public Broadcasting Act expressly declares that CPB "will not be an agency or establishment of the United States Government" (47 U.S.C. § 396(b)), and it prohibits any federal agency or employee from exercising any "direction, supervision, or control" over either CPB or any of its grantees (47 U.S.C. § 398(a)), or over the content of any public telecommunications programs or services (47 U.S.C. § 398(c)). Moreover, CPB is governed by a bi-partisan board of directors (47 U.S.C. § 396(c)(1)); no board members may be employees of the United States (47 U.S.C. § 396(c)(2)); no political tests may be used in CPB personnel actions and decisions (47 U.S.C. § 396(e)(2)); and CPB may not contribute to or otherwise support any political party or candidate for election to public office (47 U.S.C. § 396(f)(3)). In addition, CPB itself may not produce, schedule, or disseminate programs directly to the public (47 U.S.C. § 396(g)(3)(B)); it may not own or operate any broadcast station, network, or interconnection facility (47 U.S.C. § 396(g)(3)(A)); and it must adhere strictly to a standard of "objectivity and balance in all programs . . . of a controversial nature" (47 U.S.C. § 396(g)(1)(A)). Lastly, CPB distributes its grants to eligible local stations strictly according to an objective, nondiscretionary formula. J.S. App. 13a.

Virtually all of these safeguards were contained in the Senate-approved version of the 1967 Act. The question of editorializing by noncommercial stations did not arise until the House Committee was considering the Senate bill. Then, "[o]ut of abundance of caution" (H.R. Rep. No. 572, 90th Cong., 1st Sess. 20, *reprinted in* [1967] U.S. Code Cong. & Ad. News 1799, 1810), and despite the acknowledgment by the amendment's leading proponent that "anyone who has had any experience in the past 6 years knows there has not been the slightest control of any kind exercised by the Federal Government in making grants [in the noncommercial educational television field]" (113 Cong. Rec. 26407 (remarks of Rep. Springer)), the House for the first time adopted a prohibition against editorializing by noncommercial broadcasting stations, whether or not they received any federal funding.² The Senate acquiesced in the addition of this provision, which in its original form read:

No noncommercial educational broadcasting station may engage in editorializing or may support or oppose any candidate for political office.

47 U.S.C. § 399 (1967).

²There is absolutely no basis for appellant's assertion that "[w]hen the original act was passed, it was generally assumed that all public broadcasting stations would receive government funding." J.S. at 4. Indeed, appellant's only alleged support for this claim — the unsuccessful amendment offered by Representative Devine to distribute \$5 million equally among all existing noncommercial stations — actually demonstrates that just the opposite was the case: The amendment was proposed precisely because the Public Broadcasting Act as enacted did not contain any assurances or provisions for funds to be distributed to all local stations. See 113 Cong. Rec. 26415-16. Moreover, while the Committee Reports indicate Congress' expectation that CPB would endeavor to distribute its funds fairly throughout various geographic regions of the country, they also evidence Congress' understanding that not all local noncommercial broadcasting stations would receive CPB funding. See, e.g., H.R. Rep. No. 572, 90th Cong., 1st Sess. 17, *reprinted in* [1967] U.S. Code Cong. & Ad. News 1799, 1807.

Proceedings Below

Appellees filed the instant action challenging the constitutionality of § 399 on April 30, 1979, and shortly thereafter moved for summary judgment. In response, the Department of Justice, as attorney for the FCC, notified the District Court that because the Department had concluded that the prohibition against editorializing violated the First Amendment, it could not and would not defend the constitutionality of the statute. As Attorney General Civiletti explained:

After careful consideration, we have concluded that Section [399] violates the First Amendment guarantees of freedom of speech and freedom of the press by restricting the ability of public broadcasting stations to comment on matters of public interest. While not every restriction on expression is necessarily unconstitutional, such restrictions must serve some compelling state interest. We have not been able to identify any compelling governmental interest served by Section [399] which would justify the statute's prior restraint on speech. Furthermore, even if the Department of Justice could fashion an argument that the statute serves a compelling government interest, the statute would still be constitutionally defective on grounds of overbreadth since public broadcasting stations receiving no federal funds are covered. Finally, we have concluded that there are less restrictive means to achieve the suggested purposes of the statute.

The Department of Justice is, of course, fully mindful of its duty to support the laws enacted by Congress. Here, however, the Department has determined, after careful study and deliberation, that reasonable arguments cannot be advanced to defend the challenged statute.

Letter from Attorney General Benjamin R. Civiletti to Senate Majority Leader Robert C. Byrd, October 11, 1979 (filed

as Exhibit "A" to Plaintiffs' Memorandum in Support of Plaintiffs' Motion to Disallow Filing of Senate's Motion to Dismiss and attached hereto as App. A, at 1a-2a).

Although the Department of Justice therefore offered no further defense of the editorializing ban at that time, the Senate Legal Counsel, appearing as *amicus curiae* pursuant to 2 U.S.C. § 288e(a), sought and obtained dismissal of the lawsuit on the ground that the District Court was without jurisdiction to decide the issues presented in the absence of a justiciable case or controversy. While the expedited appeal from the District Court's order of dismissal was pending in the Ninth Circuit Court of Appeals, however, the Department of Justice under the new Attorney General reversed its position and announced that it would both enforce and defend the challenged statute.³

The District Court therefore vacated its order of dismissal and recalendared appellees' motion for summary judgment. Then, after briefing was completed and only three days before oral argument was set to be heard, Congress amended § 399 to its present form. The scope of the prohibition against editorializing was limited to those noncommercial broadcasting stations that receive grants from CPB, thereby freeing the more than 800 public television and radio stations that had been receiving no federal funds from the statute's blatantly unconstitutional restrictions.

³Although the FCC, as the agency charged with administering and enforcing the provisions of the Communications Act, was and continues to be the nominal defendant and appellant in this lawsuit, the Commission informed the District Court that it was taking no position on the constitutional question presented in this case, noting that the arguments advanced by the Justice Department in defense of § 399 did not necessarily reflect the positions taken by the Commission in other areas of policy. See Defendant's Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Summary Judgment 1-2 n*.

Because appellees' First Amendment rights continued to be violated by § 399's restraint on freedom of speech, however, they renewed their motion for summary judgment, now focusing their challenge solely on the statutory ban on editorializing by CPB-funded noncommercial broadcasters. On August 6, 1982, the District Court entered an order granting summary judgment in favor of appellees, declaring 47 U.S.C. § 399's editorializing prohibition unconstitutional, enjoining the FCC from enforcing the prohibition, and awarding appellees their costs and reasonable attorneys' fees. (J.S. App. 21a-22a.) Finding that the right of noncommercial broadcasters to express their views on public issues was entitled to the full panoply of First Amendment protections, the District Court concluded that the government had failed to establish that § 399's ban on editorializing was narrowly tailored to serve a compelling interest. (J.S. App. 17a-18a.) The court determined that in light of the diverse sources of funding for noncommercial broadcast stations, the numerous safeguards built into the federal funding system to ensure that noncommercial broadcasters remain free of government control, and the fairness doctrine's added protections against the one-sided presentation of issues of public importance, the evidence simply did not support the alleged fear of government control of the noncommercial broadcast media. (J.S. App. 12a-15a.) Similarly, the court concluded that the desire to ensure the balanced presentation of opinion by CPB-funded noncommercial broadcasters was not sufficiently compelling to justify § 399's ban on protected speech. (J.S. App. 15a-17a.) Having rejected both of the purported interests asserted by the government in support of the statute, the District Court held that 47 U.S.C. § 399 violated the First Amendment insofar

as it prohibited noncommercial broadcasters from editorializing.⁴

On August 16, 1982, appellant filed a timely Motion to Alter or Amend the Judgment pursuant to Fed. Rule Civ. Proc. 59(e), on the ground that the award of attorneys' fees was barred by sovereign immunity because it was not made in accord with the procedures or limitations of the Equal Access to Justice Act, 28 U.S.C. § 2412. *See* App. B, at 3a-4a. With that motion still pending before the District Court, the notice of appeal to this Court was filed on September 3, 1982. (J.S. App. 23a.) Almost two months later, on November 1, 1982, the District Court disposed of the Rule 59(e) motion, granting the relief requested by appellant and striking its previous award of attorneys' fees from the judgment.⁵ No subsequent notice of appeal was filed, and the government's appeal was docketed in this Court on December 1, 1982. Upon appellees' motion, the time for filing this Motion to Dismiss or Affirm was extended to January 20, 1983.

⁴Because the District Court concluded that neither of the justifications offered by the government in defense of the statute were sufficient to support its restriction on free speech rights, the court did not rule upon appellees' additional contentions that § 399 was not the least restrictive means of achieving its alleged objectives, that it was not narrowly tailored to its asserted purposes, and that it violated the Equal Protection guarantee of the Fifth Amendment.

⁵The District Court then entertained and took under submission appellees' motion for an award of reasonable costs and attorneys' fees.

MOTION TO DISMISS

Appellees move to dismiss the instant appeal on the ground that the government failed to file its notice of appeal within the time for filing set forth in Supreme Court Rule 11.3. Because "the requirement of a timely notice of appeal is 'mandatory and jurisdictional,'" *Griggs v. Provident Consumer Discount Company*, 51 U.S.L.W. 3413, 3414 (Nov. 30, 1982) (quoting *Browder v. Director, Illinois Dept. of Corrections*, 434 U.S. 257, 264 (1978)), the government's appeal must be dismissed for lack of jurisdiction.

Supreme Court Rule 11.3 (1980 revision) states that "if a petition for rehearing is timely filed by any party in the case, the time for filing the notice of appeal for all parties . . . runs from the date of the denial of rehearing or the entry of a subsequent judgment." This rule codifies "the consistent practice in civil and criminal cases alike[, which] has been to treat timely petitions for rehearing as rendering the original judgment nonfinal for purposes of appeal for as long as the petition is pending." *United States v. Dieter*, 429 U.S. 6, 8 (1976). The effect of a motion for reconsideration, therefore, is to "suspend . . . the finality of the judgment . . . until the District Court's [disposition] . . . of the motion . . . restore[s] it." *Communist Party of Indiana v. Whitcomb*, 414 U.S. 441, 445 (1974). See generally *Washington v. Confederated Tribes of Colville*, 447 U.S. 134, 149-50 (1980) (state's motion for partial retrial rendered nonfinal the district court's entire judgment, so that time for filing notice of appeal began to run on date of denial of motion); *Federal Trade Commission v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211-12 (1952); *Department of Banking v. Pink*, 317 U.S. 264 (1942).

In the instant case, the order granting summary judgment in favor of appellees was entered on August 6, 1982. The government then filed a timely Rule 59 motion to alter or amend, which suspended the finality of the District Court's judgment until November 1, 1982, the date on which the court effectively granted the government's motion and modified its previous judgment. In accordance with Supreme Court Rule 11.3 and its well-established common law precedents, the time for filing a notice of appeal thus commenced on November 1, 1982. During the subsequent thirty-day filing period,⁶ no notice of appeal was filed by the government.

The government's failure to file the requisite notice within the thirty-day filing period defeats jurisdiction in this Court. The government's premature notice of appeal, filed on September 3, 1982, prior to the date on which the District Court's judgment became final, was of no consequence. As this Court recently held in construing the analogous Fed. Rule App. Proc. 4(a)(4), which governs the time for filing a notice of appeal from a district court to a court of appeals, a premature notice of appeal, filed prior to the disposition of a motion to alter or amend, is without effect. *Griggs v. Provident Consumer Discount Company*, *supra*. It is "as if no notice of appeal were filed at all. And if no notice of

⁶The period for filing a notice of direct appeal to the Supreme Court pursuant to 28 U.S.C. § 1252 is thirty days from the entry of the interlocutory or final order, judgment, or decree. 28 U.S.C. § 2101(a).

appeal is filed at all, the Court . . . lacks jurisdiction to act." 51 U.S.L.W. at 3414.⁷

⁷As Professor R. Moore has noted:

While [Fed.] Rule [App. Proc.] 4 is applicable only to appeals from district courts to courts of appeals, its provisions as to the effect of timely post-judgment motions on the time for appeal are based upon rules of reason developed by the case law; and the principle behind them is applicable to appeals to the Supreme Court. The principle is that a post-judgment motion that has the potential for modifying or setting aside the judgment destroys its finality for purposes of appellate review, until the motion is acted upon by the court that rendered the judgment.

The effect of a motion for rehearing on the time for seeking Supreme Court review has been dealt with specifically by the 1980 revision of the Court's Rules.

12 *Moore's Federal Practice* ¶607.04[12], at 9-30 to 9-31 (2d ed. 1982) (footnotes omitted).

MOTION TO AFFIRM

Alternatively, appellees move to affirm the judgment of the District Court declaring 47 U.S.C. § 399's prohibition against editorializing by CPB-funded noncommercial broadcasters unconstitutional under the First Amendment. The District Court's careful and well-reasoned conclusion so clearly follows from the longstanding and unambiguous precedents of this Court that plenary review of the decision below is unwarranted.

The needlessness of further briefing and argument before this Court is demonstrated not only by the soundness of the District Court's decision, but by the fallacious arguments proffered by appellant in its Jurisdictional Statement. Those contentions — many of which are being raised for the first time on appeal — are both unsupported by the record in this case and contrary to established First Amendment doctrine.

A. The District Court Properly Held That the Prohibition Against Editorializing Can Survive First Amendment Scrutiny Only if It Serves a Compelling Government Interest and Is Narrowly Tailored to That End.

As the District Court found, the speech prohibited by 47 U.S.C. § 399 lies at the heart of the First Amendment's protections. (J.S. App. 9a.) By categorically proscribing the expression of the views of CPB-funded noncommercial broadcasters on issues of public importance, and thereby depriving the public of access to information and ideas so critical to our system of self-government, § 399 offends the most basic principles of freedom of speech and freedom of the press. Accordingly, the District Court correctly held that the statute could withstand the exacting scrutiny called for under the First Amendment only if the government could demonstrate that § 399's absolute ban on editorializing is

the most narrowly drawn regulation necessary to further a compelling state interest. *E.g.*, *Citizens Against Rent Control v. City of Berkeley*, 102 S.Ct. 434, 436 (1981); *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 535, 537, 540 (1980); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776, 786 (1978); *Elrod v. Burns*, 427 U.S. 347, 362-63 (1976); *Buckley v. Valeo*, 424 U.S. 1, 14-15, 25 (1976); *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

Having been unable to persuade the District Court of the existence of any compelling government interests that could justify § 399's restriction on the noncommercial broadcaster's freedom of expression, appellant has decided to try a different tack in this Court and now argues that because the editorializing prohibition applies only as a condition to the receipt of certain government grants, a less stringent standard of judicial review is warranted.*

*Appellant's "spending power" argument is being raised for the first time on appeal, and for that reason alone is not entitled to this Court's consideration. In the District Court, the government unsuccessfully attempted to demonstrate only that § 399 served two different compelling government interests. Not once did appellant ever suggest that a lower standard of review under the First Amendment was called for because § 399's restriction on expression was imposed as a condition to the receipt of federal funds. See Defendant's Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Summary Judgment; Defendant's Supplemental Memorandum on Amendment of Section 399.

Significantly, appellant has apparently now conceded that the concerns to which § 399's ban on editorializing are allegedly addressed do not rise to the level of compelling government interests. See, e.g., J.S. 8 ("the court also seriously underestimated the *substantial and legitimate* interest served by the provision against editorializing"); *id.* at 12-13 ("[t]hat prohibition serves at least two *substantial* government interests"); *id.* at 19 ("the prohibition of editorializing serves a *highly important* government interest") (emphases added). Thus, unless this Court agrees with appellant's belated argument that traditional First Amendment analysis does not apply because § 399's prohibition is conditioned on receipt of a grant from CPB, the decision below must be affirmed.

The government's argument that the First Amendment's traditional compelling interest test is inappropriate rests on a fundamental mischaracterization of both the nature of a CPB grant and the scope of § 399's prohibition. First, the grants that local stations receive for programming from the Corporation for Public Broadcasting are not "federal funds."⁹ Moreover, § 399 does not, as appellant suggests, simply restrict the manner in which the noncommercial broadcaster may spend the grant it receives. Rather, the statute imposes an outright restraint on what the broadcaster may do or say with *any* of its funds. Thus, this is not just another instance of Congress limiting the use of appropriated funds, and the examples upon which the government relies, *see* J.S. 10, are wholly inapposite to the reality of this case.¹⁰

⁹It bears emphasizing that the individual noncommercial licensees to whom § 399's prohibition applies receive grants from CPB — an independent, private corporation — and not from the government. Indeed, Congress established the Corporation precisely in order to isolate the distribution of funds to noncommercial broadcasting stations from the normal appropriations process and to remove all such decisions from government authority. Accordingly, both HEW and the Department of Commerce have themselves ruled that CPB grants to local noncommercial stations are private, rather than federal funds, and CPB has consistently taken the position that the grants it distributes do not constitute "federal financial assistance." *See, e.g.,* 44 Fed. Reg. 30898, 30907-08 (May 29, 1979); 42 Fed. Reg. 57286, 57287 (Nov. 1, 1977). *Cf.* 36 Comp. Gen. 221 (1956); 28 Comp. Gen. 54 (1948).

¹⁰For instance, the government suggests that § 399's editorializing ban is analogous to 18 U.S.C. § 1913's prohibition against lobbying with appropriated moneys and 22 U.S.C. § 1461's restriction on the International Communication Agency's dissemination of information within this country. J.S. 9-10. However, all of the government's examples relate either to statutory provisions directed at *government* agencies or employees, or to restrictions placed on what other persons may do with the *federal funds* they receive. It is an altogether different matter for Congress to prescribe what private noncommercial broadcasters may do with their own private funds.

Indeed, appellant concedes that its examples are inapposite, but maintains that a lesser standard of review is nonetheless called for because § 399 "does not seek to regulate private speech but rather attempts to prevent misuse of public funds." J.S. 10-11 (emphasis added). The critical point, of course, is that — regardless of its "intent" — § 399 *does* regulate private speech, and for that reason traditional First Amendment strict scrutiny must be applied. *See, e.g., Carey v. Brown*, 447 U.S. 455, 464-65 (1980) ("[E]ven the most legitimate goal may not be advanced in a constitutionally impermissible manner."). Furthermore, given § 399's historical prohibition against editorializing even by those stations that receive no federal funding, the "intent" of the statute is highly questionable, as well. *See* note 13 *infra*.

More important, the government's argument demonstrates a material misunderstanding of basic constitutional law. This Court has never countenanced the conditioning of a grant of federal funds on the recipient's surrender of its fundamental liberties, particularly its First Amendment right of free expression. See *Elrod v. Burns*, *supra*, 427 U.S. at 361; *Sherbert v. Verner*, 374 U.S. 398 (1963); *Speiser v. Randall*, 357 U.S. 513 (1958); *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 593-94 (1926). The reach of the Spending Power does not extend so far as to permit the government to place a price tag on the noncommercial broadcaster's exercise of its freedom of speech. As the Court of Appeals for the D.C. Circuit declared with respect to this precise issue:

Clearly, the existence of public support does not render the licensees vulnerable to interference by the federal government without regard to or restraint by the First Amendment. For while the Government is not required to provide federal funds to broadcasters, it cannot condition receipt of those funds on acceptance of conditions which could not otherwise be constitutionally imposed.

Community-Service Broadcasting of Mid-America, Inc. v. FCC, 593 F.2d 1102, 1110 (D.C. Cir. 1978) (en banc).

The flaw in appellant's argument becomes manifest upon even the most cursory consideration of its implications. Under the theory the government posits, for example, the prohibition against editorializing could presumably extend to newspapers and periodicals, for they, too, receive a valuable government subsidy in the form of reduced postal rates. See 39 C.F.R. § 111.5 (1982); *Buckley v. Valeo*, 424 U.S. 1, 93 n.127 (1976). Or, to take the factual scenario tendered by the government itself, the college professor who receives a small government grant to conduct research in

a certain area could be told what *not* to study in the remainder of his research. See J.S. 10 n.10. In fact, it follows from appellant's specious reasoning that a university which accepts federal funding to help defray some of its operating expenses could be told by the government what subjects it could and could not teach. The examples are limitless, as would be the encroachment of the federal government into the protected activities of this country's citizens if appellant's theory had any basis in constitutional doctrine.¹¹

B. The Government Interests Purportedly Served by 47 U.S.C. § 399 Cannot Justify the Statute's Prohibition Against Editorializing.

Even under the "balancing" test proposed by appellant, § 399's prohibition against editorializing cannot pass constitutional muster, for the suppression of the noncommercial broadcaster's right to express its views on issues of public importance is an unnecessary and overly restrictive response to the concerns the statute allegedly seeks to address. The government has suggested two such rationales for the editorializing ban: insulating CPB-funded noncommercial sta-

¹¹Appellant also suggests that "[b]ecause of the scarcity of broadcast frequencies (see *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388 (1969)), the government may take reasonable steps to allocate this scarce public resource fairly, even though comparable measures would not be permitted with respect to the print media or other forms of expression." J.S. 12 n.11. As the District Court concluded, however, although that statement may be true as a general proposition, in this case the government has not shown why this or any other special characteristic of the broadcast medium justifies § 399's prohibition against editorializing. See J.S. App. 10a-11a. Indeed, the special application of the First Amendment in the broadcasting context has always been invoked to *maximize* the number and diversity of views expressed over the airwaves, not to *limit* the subjects and issues that the broadcaster may discuss. Moreover, in the present case — unlike those cited by appellant (see J.S. 12 n.11) — there is no clash among the sometimes-competing First Amendment rights of the individual speaker, the broadcaster, and the listening public; each of those interests is furthered by the noncommercial broadcaster's exercise of its right to editorialize.

tions from political influence and preventing the use of "public funds" to propagate controversial views. Neither purported justification, however, can withstand even a modest level of review.¹²

As the District Court found, the hypothetical fear that permitting CPB-funded noncommercial broadcasters to editorialize would somehow subject them to government control is entirely unsupported and speculative. See *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967); *Williams v. Rhodes*, 393 U.S. 23 (1968); *NAACP v. Button*, 371 U.S. 415 (1963). The protective shield provided by CPB's independent structure and nondiscretionary grant-making procedures, the diverse funding sources for non-commercial broadcasting stations, and the fairness doctrine's requirement that coverage of public issues be balanced, all combine to ensure that CPB-funded stations will not be vulnerable to any potential government attempt to use them as propaganda organs. J.S. 14a-15a. And although appellant seeks to cast doubt upon the validity of the District Court's decision by quibbling over the degree to which these safeguards can guarantee air-tight insulation from political pressures (J.S. 15-19), the government in any event offers no explanation of how § 399's prohibition against edito-

¹²Appellant's argument is sprinkled with suggestions that the courts must defer to the judgment of Congress in assessing the substantiality of the asserted government interests and in reviewing the constitutionality of § 399. See, e.g., J.S. 12, 15, 19, 21. However, as this Court has often admonished:

Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake. . . . Were it otherwise, the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified.

Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843-44 (1978).

rializing remedies the supposed threat of interference that might exist.¹³

¹³ It is most unlikely that Congress, in enacting § 399, was actually motivated by the government interests now being put forward by appellant in defense of the statute. To be sure, Congress wished to ensure that the noncommercial broadcasters would be free from any federal control over programming, and to that end it established the Corporation for Public Broadcasting and constructed numerous statutory safeguards to protect both CPB and the local stations from any possibility of political influence. But there is every indication in the legislative history of the Public Broadcasting Act that Congress was motivated by an entirely different — and illegitimate — purpose in passing § 399: the desire to suppress potentially critical public comment. As the leading proponent of the ban on editorials explained, "There are some of us who have very strong feelings because they have been editorialized against." Hearings on H.R. 6736 and S. 1160 Before House Committee on Interstate and Foreign Commerce, 90th Cong., 1st Sess. 641 (remarks of Rep. Springer). See also 113 Cong. Rec. 26391 (1967) (remarks of Rep. Keith: "It is conceivable that [a certain noncommercial television broadcast] could . . . have adversely affected my candidacy for reelection."); *id.* (remarks of Rep. Joelson: "Those of us in public office are in a position where newspapers, radio, or TV stations can say anything they wish about us. . . . Therefore, the right of editorializing should be very, very carefully scrutinized."). This troubling legislative history has not escaped the attention of courts and commentators. See, e.g., *Community-Service Broadcasting*, *supra*, 593 F.2d at 1128 n.25 (Robinson, J., concurring); Lindsey, *Public Broadcasting: Editorial Restraints and The First Amendment*, 28 Fed. Com. B. J. 63, 81 (1975); Toohey, *Section 399: The Constitution Giveth and Congress Taketh Away*, 6 Educ. Broadcasting Rev. 31, 34 (1972) ("[T]he purpose of Section 399 was clear: to prevent Congress from creating a monster that might someday turn on its creator. Therefore, to achieve its own self-protective ends Congress simply legislated away a significant part of educational broadcasters' right of free speech.").

That the prohibition against editorializing was not adopted to protect against government control of noncommercial programming is further demonstrated by the fact that at the time of § 399's enactment, and until its amendment fourteen years later in response to this lawsuit, the prohibition applied to the hundreds of noncommercial broadcasters that received absolutely no federal funding. Even today, as appellant acknowledges (J.S. 16 n. 14), the statute's restriction covers only those stations that receive grants from CPB, but not those receiving the more discretionary funding from other federal agencies, such as the Departments of Education and Commerce, the National Endowment for the Arts, and the National Endowment for the Humanities. Cf. *Carey v. Brown*, *supra*, 447 U.S. at 465 & n.9.

Moreover, to allow the government to silence the broadcaster's editorial voice in order to prevent the theoretical possibility of government interference with the free expression of that very voice would stand the First Amendment on its head. The constitutionally permissible response to any such fear is not to close down the broadcaster's studio, but "to push the doors open to all viewpoints." *Community-Service Broadcasting*, *supra*, 593 F.2d at 1134 n. 62 (Robinson, J., concurring). The dominant theme in First Amendment law is that the remedy for any perceived imbalance in the "marketplace of ideas" is more speech, not less speech. *See, e.g., First National Bank of Boston v. Bellotti*, *supra*, 435 U.S. at 790-91; *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969); *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). As the appellant FCC itself cogently concluded in rejecting the call for a prohibition on editorializing by commercial broadcasters:

Assurance of fairness must in the final analysis be achieved, not by the exclusion of particular views because of the source of the views, or the forcefulness with which the view is expressed, but by making the microphone available, for the presentation of contrary views without deliberate restrictions designed to impede equally forceful presentation.

In re Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1253-54 (1949).

Finally, appellant's contention that § 399's ban on editorializing is necessary to obviate any constitutional problems that might inhere in using taxpayers' money to promote the noncommercial broadcaster's editorial views can readily

be dismissed.¹⁴ One need look no farther than this Court's endorsement of the public financing of presidential election campaigns in the face of the constitutional challenge in *Buckley v. Valeo*, *supra*, to confirm that where financial assistance is provided, not to abridge, but to facilitate the exercise of free speech, the funding of private political views does not violate the First Amendment rights of taxpayers who might disagree with those views. *See* 424 U.S. at 90-93. Indeed, in rejecting the plaintiffs' First Amendment claims in that case, this Court specifically adverted to the provision of aid to noncommercial broadcasting as an example of legislation that sought to enhance First Amendment values by promoting "a society in which 'uninhibited, robust, and wide-open' public debate concerning matters of public interest would thrive." *Id.* at 93 n.127 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). Because editorializing by noncommercial broadcasters likewise furthers "the First Amendment goal of producing an informed public capable of conducting its own affairs," *Red Lion Broadcasting Co. v. FCC*, *supra*, 395 U.S. at 392, federal funding of that expression would pose no constitutional problem.¹⁵

¹⁴Why the District Court never discussed this alleged government interest (*see* J.S. 19) is quite obvious: Appellant never raised it. And why it was not argued to the court below is quite obvious, too: There is not a word in the legislative history to indicate that Congress was actually motivated by this concern in enacting § 399, nor is there any basis for asserting that the funding of noncommercial broadcasters' editorial expression would create First Amendment problems.

¹⁵Appellant's reliance on *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), is misplaced, for that case held only that an individual could not be required "to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher." *Id.* at 235. It is quite a different matter, of course, to assert that the government may not spend its funds to support an endeavor with which some taxpayers may disagree. As this Court noted in *Buckley v. Valeo*, *supra*, every appropriation made by Congress uses public money in a manner to which some taxpayers object, so the existence of that disagreement does not in and of itself pose any constitutional dilemma. 424 U.S. at 90-92. *Cf. Frothingham v. Mellon*, 262 U.S. 447 (1923). Furthermore, it is a giant leap from the remedy applied in *Abood*, which did not infringe on anyone's right to express his political views, to § 399's complete suppression of the noncommercial broadcaster's editorial opinions. *Cf. First National Bank of Boston v. Bellotti*, *supra*, 435 U.S. at 794 n.34.

At best then, 47 U.S.C. § 399 is an overly restrictive means of responding to the purely hypothetical possibility of government interference with the CPB-funded noncommercial broadcaster's editorial decisions. At worst, it is an ill-disguised attempt by Congress to suppress potentially critical public comment. In either event, the statute imposes restraints on protected political expression far beyond those that are essential to further any purported compelling government interests. The District Court was therefore plainly correct in declaring § 399's prohibition against editorializing unconstitutional under the First Amendment.

CONCLUSION

For the reasons stated above, appellees move this Court to dismiss the appeal or, in the alternative, to affirm the judgment of the District Court for the Central District of California.

Respectfully submitted,

FREDRIC D. WOOSHER

LUCAS GUTTENTAG

MARILYN O. TESAURO

CARLYLE W. HALL, JR.

JOHN R. PHILLIPS

CENTER FOR LAW IN THE

PUBLIC INTEREST

Attorneys for Appellees

APPENDIX A

Letter to Senator Robert C. Byrd From Benjamin R. Civiletti, Attorney General

[October 11, 1979]

PB: KOlesker:bgg
82-12C-69

Tel: 633-3495

Honorable Robert C. Byrd
Senate Majority Leader
United States Senate
Washington, D. C. 20510

Dear Senator Byrd:

In *League of Women Voters of California, et al. v. Federal Communications Commission* (C.D. Cal., No. CV 79-1562-MML (PX)), the plaintiffs challenge, on First and Fifth Amendment grounds, the constitutionality of Section 399(a) of the Public Broadcasting Act of 1967, 47 U.S.C. §399(a), which prohibits all public broadcasting stations from editorializing and supporting or opposing political candidates. I wish to inform the Senate that the United States will not defend the constitutionality of the statute.

After careful consideration, we have concluded that Section 399(a) violates the First Amendment guarantees of freedom of speech and freedom of the press by restricting the ability of public broadcasting stations to comment on matters of public interest. While not every restriction on expression is necessarily unconstitutional, such restrictions must serve some compelling state interest. We have not been able to identify any compelling governmental interest served by Section 399(a) which would justify the statute's prior restraint on speech. Furthermore, even if the Department of Justice could fashion an argument that the statute serves a compelling government interest, the statute would still be

constitutionally defective on grounds of overbreadth since public broadcasting stations receiving no federal funds are covered. Finally, we have concluded that there are less restrictive means to achieve the suggested purposes of the statute.

The Department of Justice is, of course, fully mindful of its duty to support the laws enacted by Congress. Here, however, the Department has determined, after careful study and deliberation, that reasonable arguments cannot be advanced to defend the challenged statute. The Federal Communications Commission has informed us that it agrees that the statute cannot be defended successfully in its present form.

The Department has filed an Answer to Plaintiffs' Complaint to protect your interests should you decide to defend this suit, and the Court has established a briefing schedule. If the Department can be of further assistance to you in explicating the reasons for declining to defend this case or if you or your staff believe it would be helpful to discuss the options that the Senate may wish to pursue, Thomas S. Martin, Deputy Assistant Attorney General, Civil Division, will be pleased to discuss the matter further. He can be reached at 633-3309.

Sincerely,

BENJAMIN R. CIVILETTI
Attorney General

APPENDIX B

**Notice of Defendant's Motion to
Alter or Amend Judgment**

In the United States District Court
for the Central District of California

League of Women Voters of
California, et al.,

Plaintiffs,

v.

Federal Communications
Commission,

Defendant.

No. CV 79-1562-
MML(PX).

Notice of
Defendant's Motion
to Alter or Amend
Judgment

Hearing:

September 20, 1982
10:00 a.m.

**TO THE ABOVE-NAMED PARTIES AND THEIR
ATTORNEYS OF RECORD:**

PLEASE TAKE NOTICE that on September 20, 1982, at 10:00 a.m., or as soon thereafter as defendant may be heard, defendant will bring on for hearing before the Honorable Malcolm M. Lucas, its Motion to Alter or Amend Judgment pursuant to Rule 59(e), Fed.R.Civ.Pro., on the ground that the award to plaintiffs of reasonable attorneys' fees is barred by sovereign immunity because the award was not made in accord with the procedures or limitations of the

Equal Access to Justice Act, 28 U.S.C. § 2412. This motion is supported by a memorandum of points and authorities.

Dated: August 16, 1982

Respectfully submitted,

J. PAUL McGRATH

Assistant Attorney General

STEPHEN S. TROTT

United States Attorney

STEPHEN D. PETERSEN

Assistant United States Attorney

/s/ Paul Blankenstein

PAUL BLANKENSTEIN

/s/ Judith F. Ledbetter

JUDITH F. LEDBETTER

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10th & Constitution Avenue, N.W.

Washington, D. C. 20530

Telephone: (202) 633-3256

Attorneys for Defendant.

FEB 16 1983

ALEXANDER L. STEVAS,
CLERK

No. 82-912

In the Supreme Court of the United States

OCTOBER TERM, 1982

FEDERAL COMMUNICATIONS COMMISSION, APPELLANT

v.

LEAGUE OF WOMEN VOTERS OF CALIFORNIA, ET AL.

*ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA*

**REPLY MEMORANDUM FOR THE FEDERAL
COMMUNICATIONS COMMISSION**

REX E. LEE

Solicitor General

Department of Justice

Washington, D.C. 20530

(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1982

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FEDERAL COMMUNICATIONS COMMISSION, APPELLANT

v.

LEAGUE OF WOMEN VOTERS OF CALIFORNIA, ET AL.

*ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA*

REPLY MEMORANDUM FOR THE FEDERAL COMMUNICATIONS COMMISSION

Appellees' motion to affirm fails to demonstrate that "the questions on which the decision of the cause depends are so unsubstantial as not to need further argument" (Sup. Ct. R. 16.1(c)).¹ Appellees also have moved to dismiss the appeal in this case, however, contending that the notice of appeal was filed prematurely and therefore not within 30 days after entry of the order sought to be appealed, as required by 28 U.S.C. 2101(a). We file this reply memorandum to address this specious argument.

¹One aspect of appellees' argument on the merits deserves response. Contrary to appellees' assertion (Mot. to Dis. 19 n.12), this Court has "accorded 'great weight to the decisions of Congress' even though the legislation implicated fundamental constitutional rights guaranteed by the First Amendment." *Fullilove v. Klutznick*, 448 U.S. 448, 472 (1980), quoting *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 102 (1973).

1. On August 5, 1982, the district court issued an order that (1) declared unconstitutional the provision of 47 U.S.C. 399 prohibiting editorializing by certain public broadcasting stations, (2) enjoined the Federal Communications Commission and others from enforcing that provision, and (3) provided that appellees "shall recover their costs and reasonable attorneys' fees" (J.S. App. 21a-22a). That order was entered on August 6, 1982. On August 16, 1982, the Commission filed what was styled a motion to alter or amend the judgment under Fed. R. Civ. P. 59(e) "on the ground that the award to plaintiffs of reasonable attorneys' fees [is] barred by sovereign immunity because the award was not made in accord with the procedures or limitations of the Equal Access to Justice Act, 28 U.S.C. § 2412" (Mot. to Dis. App. 3a-4a). Appellees opposed this motion. On September 3, 1982, the Commission filed a notice of appeal from the district court order of August 5 (J.S. App. 23a-24a). Justice Rehnquist subsequently extended the time for docketing the appeal until December 1, 1982, and the appeal was docketed on that date. This Court's jurisdiction was invoked under 28 U.S.C. 1252, which provides in pertinent part:

Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States * * * holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies * * * is a party.

In the interim, the district court addressed the pleadings concerning attorneys' fees. The district court declined to treat the Commission's August 16 motion as a motion under Fed. R. Civ. P. 59(e). A minute order entered on November 1, 1982, by the clerk of the court, reports the following proceedings (App., *infra*; emphasis added):

The Court Orders that its previous award of attorney fees is stricken from the judgment. Plaintiffs' opposition to the defendant [*sic*] motion to amend judgment is deemed a motion for attorney fees *and the defendant's motion to amend the judgment is deemed the opposition to a motion for attorney fees.*²

What the court deemed appellees' motion and the Commission's opposition are still pending.

2. Appellees argue (Mot. to Dis. 11-13) that the Commission's notice of appeal was not timely filed for the following reason. They contend (Mot. to Dis. 11-12) that the Commission's August 16 motion regarding attorneys' fees was a "motion for reconsideration" that "suspended the finality of the District Court's judgment" and terminated the running of the time for appeal. They appear to argue (*ibid.*) that the reported proceedings of November 1, 1982, constituted a final disposition of this case and that the time for appeal ran from that date. They therefore conclude (Mot. to Dis. 12-13) that the notice of appeal filed on September 3 was premature and consequently of no effect (see *Griggs v. Provident Consumer Discount Co.*, No. 82-5082 (Nov. 29, 1982) (notice of appeal to court of appeals filed while timely Rule 59 motion is pending is a nullity). And since another notice of appeal was not filed within 30 days after November 1, appellees maintain (Mot. to Dis. 12-13) that appellate jurisdiction is lacking. Appellees' argument is clearly incorrect for two independent reasons.

²This is apparently the "motion" to which appellees refer (Mot. to Dis. 10 n.5) when they state that "[t]he District Court then entertained and took under submission appellees' motion for an award of reasonable costs and attorneys' fees."

a. First, appellees' argument is predicated upon the false assumption that an appeal to this Court under 28 U.S.C. 1252, like an appeal to the court of appeals under 28 U.S.C. 1291, may be taken only from a final judgment. Thus, appellees argue that the Commission's motion regarding attorneys' fees rendered the August 5 order "nonfinal" (Mot. to Dis. 11) and "suspended the finality of the District Court's judgment until November 1, 1982" (Mot. to Dis. 12). However, 28 U.S.C. 1252 "applies to interlocutory as well as final judgments, decrees, and orders" declaring an Act of Congress unconstitutional (*McLucas v. DeChamplain*, 421 U.S. 21, 30 (1975)). Accordingly, it is utterly irrelevant whether the motion concerning attorneys' fees rendered the August 5 order "nonfinal" or "suspended the finality" of the district court's judgment. Because 28 U.S.C. 1252 permits an appeal from interlocutory orders, appellees' entire argument collapses, and it becomes apparent that the appeal in this case was taken within the time prescribed by the Rules of this Court and the relevant statutes.

Sup. Ct. R. 11.2 provides that an appeal from a district court order declaring an Act of Congress unconstitutional "shall be in time when the notice of appeal * * * is filed with the clerk of the appropriate court within the time allowed by law for taking such appeal and the case is docketed within the time provided in Rule 12" (emphasis added). These requirements were met in the present case. "The time for filing the notice of appeal runs from the date the judgment or decree sought to be reviewed is rendered" (Sup. Ct. R. 11.3). Here, the "judgment or decree sought to be reviewed" was the portion of the August 5 order (whether considered interlocutory or final) holding a provision of 47 U.S.C. 399 unconstitutional.³ The notice of appeal was filed within

³By contrast, under 28 U.S.C. 1291, the asserted basis for appellate jurisdiction in *Griggs* (see *Griggs v. Provident Consumer Discount Co.*, 680 F.2d 927, 929 (3d Cir. 1982)), the appeal must be taken from

30 days after the entry of that order, as required by 28 U.S.C. 2101(a), and the appeal was timely docketed. Accordingly, the appeal was "in time" under Sup. Ct. R. 11.2.

Appellees rely (Mot. to Dis. 11) upon the provision of Sup. Ct. R. 11.3 that states that "if a petition for rehearing is timely filed by any party in the case, the time for filing the notice of appeal for all parties * * * runs from the date of the denial of rehearing or the entry of subsequent judgment." However, this provision, which was added in 1980, does not provide, as the 1979 revision of Fed. R. App. P. 4(a)(4) does, that a premature notice of appeal is a nullity. Even if such a gloss may be inferred, it should apply only to appeals under 28 U.S.C. 1257, which must be from "[f]inal judgments or decrees," and not to appeals under 28 U.S.C. 1252. Applying such a rule to appeals under Section 1252 would frustrate Congress' intent and would lead to absurd results.

Section 1252 was framed to permit speedy, conclusive appellate adjudications when acts of Congress are held unconstitutional in civil cases in which the federal government or its officer is a party and will therefore be bound. See *McLucas v. DeChamplain*, *supra*, 421 U.S. at 31; *Fleming v. Rhodes*, 331 U.S. 100, 104 & n.6 (1947); H.R. Rep. No. 212, 75th Cong., 1st Sess. 2 (1937) (provision allowing direct appeal is designed to ensure a "prompt determination by the court of last resort of disputed questions of the constitutionality of acts of the Congress"). Thus, immediate

the final order, and the time for filing a notice of appeal therefore begins to run from the entry of that order. See Fed. R. App. P. 4(a). Since a timely motion under Fed. R. Civ. P. 59(c) destroys the finality of any prior judgment, when such a motion is filed the time for filing a notice of appeal runs from the disposition of that motion, and a notice of appeal filed while that motion is pending is premature and a nullity. Fed. R. App. P. 4(a)(4); *Griggs v. Provident Consumer Discount Co.*, *supra*, slip op. 5.

appeal to this Court is authorized, and appeals may be taken from interlocutory as well as final orders. Indeed, this Court has allowed an immediate appeal under Section 1252 when a district court grants a preliminary injunction on the ground that a federal statute is unconstitutional, even though the court might reverse its holding at or before the permanent injunction stage. *McLucas v. DeChamplain*, *supra*, 421 U.S. at 31; *Fleming v. Rhodes*, *supra*, 331 U.S. at 103-104.

Appellees' argument — that an appeal may not be taken when collateral matters are under reconsideration by the district court — is contrary to this plan. Since a preliminary holding of unconstitutionality is immediately appealable to this Court under 28 U.S.C. 1252 even though the district court might modify it in later stages of the proceedings, it is hard to understand why a conclusive adjudication of unconstitutionality should not be appealable while collateral issues are being reconsidered. And since an appeal under 28 U.S.C. 1252 may be taken from an interlocutory order (which means that an appeal may be taken even though certain claims or requests for relief have not been considered at all by the district court), it is hard to see why an appeal should be precluded when these same matters are being reconsidered by the district court. Moreover, acceptance of appellees' argument would mean that an appeal of an interlocutory order holding a federal statute unconstitutional could be prevented by the simple expedient of moving for reconsideration of a previously decided collateral matter. This could delay review by this Court of decisions striking down an Act of Congress, perhaps indefinitely, pending the district court's reconsideration of collateral and often relatively insignificant matters. Here, for example, more than six months have elapsed since the district court declared a provision of 47 U.S.C. 399 unconstitutional, and the collateral issue of attorneys' fees has not yet been resolved.

Appellees rely (Mot. to Dis. 12) by way of analogy upon a provision of Fed. R. App. P. 4(a)(4) stating that a notice of appeal filed while certain post-judgment motions are pending "shall have no effect." That provision, of course, does not apply to appeals to this Court (see Fed. R. App. P. 1(a)), and the policies that led to its promulgation are also inapplicable in this context. As the Court explained in *Griggs v. Provident Consumer Discount Co.*, *supra*, slip op. 3, Rule 4(a)(4) was issued in its present form out of concern that the district courts and the courts of appeals "would be simultaneously analyzing the same judgment."⁴ In this case, however, the sole subject of the Commission's August 16 motion — attorneys' fees — is wholly separate from the only question raised in the Commission's jurisdictional statement — the constitutionality of 47 U.S.C. 399. There is thus no danger that this Court and the district court will be "simultaneously analyzing the same judgment" (*Griggs v. Provident Consumer District Co.*, *supra*, slip op. 3).

b. Even if the pendency of a true motion to alter or amend the judgment would have precluded an appeal under 28 U.S.C. 1252, there would still be no basis for dismissing the present appeal. The Commission's motion regarding

⁴Before 1979, when this possibility remained merely "theoretical," it caused neither this Court nor the courts of appeals undue concern, and the practice had evolved that "if the notice of appeal was filed after the motion to vacate, alter, or amend the judgment * * * the district court retained jurisdiction to decide the motion, but the notice of appeal was nonetheless considered adequate for purposes of beginning the appeals process." *Griggs v. Provident Consumer Discount Co.*, *supra*, slip op. 3. When, due to other changes in the rules of appellate procedure, the possibility of two courts simultaneously analyzing the same judgment became an actual possibility, this Court promulgated the provision of Rule 4(a)(4) stating that a "notice of appeal filed before the disposition of [a Rule 59(e) motion to alter or amend the judgment] * * * shall have no effect." See Advisory Committee Note to subdivision (a)(4) of Fed. R. App. P. 4, 28 U.S.C. App. (Supp. V), at 146.

attorneys' fees was not properly a motion to alter or amend the judgment under Fed. R. Civ. P. 59(e) and was not regarded as such by the district court. In *White v. New Hampshire Department of Employment Security*, 455 U.S. 445 (1982), this Court held that a motion for attorneys' fees under 42 U.S.C. 1988 was not a Rule 59(e) motion and thus did not destroy the finality of an otherwise final judgment. The Court reasoned (455 U.S. at 451; footnote omitted) that Rule 59(e) has generally been invoked "only to support reconsideration of matters properly encompassed in a decision on the merits" and that "a request for attorney's fees under § 1988 raises legal issues collateral to the main cause of action — issues to which Rule 59(e) was never intended to apply."

This reasoning applies here. The Commission's motion regarding attorneys' fees did not concern the merits of the constitutional questions presented by this case but instead involved legal issues wholly collateral to the main cause of action. In apparent recognition of these facts, the district court declined to treat the Commission's motion as one to alter or amend the judgment. Instead, the court deemed appellees' opposition to the Commission's motion to be a motion for attorneys' fees, and the court treated the Commission's motion as an opposition to that request. See App., *infra*. Thus, since no motion to alter or amend the judgment was properly filed in this case, there would be no basis for treating the notice of appeal as a nullity even if Fed. R. App. P. 4(a)(4) applied to appeals to this Court.

For these reasons and the reasons stated in our jurisdictional statement, it is respectfully submitted that probable jurisdiction should be noted.

REX E. LEE
Solicitor General

FEBRUARY 1983

APPENDIX
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES — GENERAL

Case No. CV79-1562-MML Date November 1, 1982

Title League of Women Voters, et al. -v- F. C. C.

PRESENT:

HON. MALCOLM M. LUCAS, JUDGE

Duane Hostetter

Don Mehler

Deputy Clerk

Court Reporter

**ATTORNEYS PRESENT
FOR PLAINTIFFS:**

Fredric Woocher

**ATTORNEYS PRESENT
FOR DEFENDANTS:**

Judith Ledbetter, USDJ

PROCEEDINGS:

Counsel are present. The Court Orders that its previous award of attorney fees is stricken from the judgment. Plaintiffs' opposition to the defendant motion to amend judgment is deemed a motion for attorney fees and the defendant's motion to amend the judgment is deemed the opposition to a motion for attorney fees.

The motion for an award of attorney fees is argued to the Court. The Court takes the motion under submission.

Initials of Deputy Clerk *[illegible]*
la

No. 82-912

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CLERK

In the Supreme Court of the United States
OCTOBER TERM, 1982

FEDERAL COMMUNICATIONS COMMISSION, APPELLANT

v.

LEAGUE OF WOMEN VOTERS OF CALIFORNIA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether 47 U.S.C. 399, which prohibits "editorializing" by noncommercial educational broadcasting stations that receive grants from the Corporation for Public Broadcasting, violates the First Amendment.

PARTIES TO THE PROCEEDING

The parties in the district court, in addition to those in the caption, were the Pacifica Foundation and Congressman Henry Waxman.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-912

FEDERAL COMMUNICATIONS COMMISSION, APPELLANT

v.

LEAGUE OF WOMEN VOTERS OF CALIFORNIA, ET AL.

*ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA*

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (J.S. App. 1a-20a) is reported at 547 F. Supp. 379.

JURISDICTION

The judgment of the district court (J.S. App. 21a-22a) was entered on August 5, 1982. The notice of appeal (J.S. App. 23a) was filed on September 3, 1982. On October 26, 1982, Justice Rehnquist extended the time for docketing an appeal until December 1, 1982, and the appeal was docketed on that date. On February 28, 1983, the Court postponed further consideration of the question of jurisdiction to the hearing on the merits. The jurisdiction of this Court rests on 28 U.S.C. 1252.

We addressed the question of this Court's jurisdiction in the reply brief filed in response to appellees' motion to dismiss or affirm and have little to add to it. We stress here the following three fundamental points. First, 28 U.S.C. 1252, on which appellate jurisdiction rests, was enacted to ensure a "prompt determination by the court of last resort

of disputed questions of the constitutionality of acts of the Congress" (H.R. Rep. No. 212, 75th Cong., 1st Sess. 2 (1937)). The section therefore carefully specifies that appeal may be taken from "an interlocutory or final" order (28 U.S.C. 1252; emphasis added).¹ Appellees' argument would defeat that intent by delaying such litigation until the wholly unrelated question of attorneys fees is resolved in the lower court. Second, appellees in this case were not in any way prejudiced by the timing of the filing of the August 16 motion regarding attorneys fees or the notice of appeal. Third, the issue still pending in district court—the award of attorneys fees—is completely separate from the constitutional question raised in our appeal, and there is accordingly no sensible reason why resolution of the constitutional question should await the lower court's disposition of the matter of attorneys fees.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are set forth in the attached Appendix, *infra*, 1a.

STATEMENT

This case raises the question whether Congress's considered judgment, that noncommercial educational broadcast stations receiving federal government subsidies should be prohibited from editorializing and from partisan participation in political elections, is constitutionally permissible.

Congress's judgment is embodied in 47 U.S.C. (Supp. V) 399, as amended by the Public Broadcasting Amendments Act of 1981, Pub. L. No. 97-35, Title XII, Section 1229, 95 Stat. 730, which prohibits those noncommercial educational broadcasting stations that are subsidized by grants from the Corporation for Public Broadcasting ("CPB" or "the Corporation") from "editorializing" and from "support[ing] or oppos[ing] any candidate for political office."

Congress made it clear in enacting this provision that its intention was not to restrict the airing of controversial or political *programs* but only "editorials representing the opinion of the management of [the] station" (H.R. Conf. Rep. No. 794, 90th Cong., 1st Sess. 12 (1967)). According-

¹ See *McLucas v. DeChamplain*, 421 U.S. 21, 30 (1975).

ly, the Federal Communications Commission has construed the term "editorializing" to mean only the "use of noncommercial educational broadcast facilities by licensees, their management or those speaking on their behalf for the propagation of the licensees' own views on public issues * * *" (*In re Complaint of Accuracy in Media, Inc.*, 45 F.C.C.2d 297, 302 (1973) (emphasis added)). Subsidized public stations—like all other stations—remain free to air programs espousing views on all matters of public concern, whether political or nonpolitical, partisan or nonpartisan, so long as it is "made clear that the editorials are not made on behalf of the licensee or its management" (J.A. App. 8a).²

As originally enacted in 1967, Section 399 applied to all noncommercial broadcasting stations. In 1978, the Senate defeated a proposal to limit the provision to stations "licensed to any governmental agency or instrumentality."³ In 1979 appellees—the Pacifica Foundation, the League of Women Voters, and Congressman Henry Waxman—brought this suit in the United States District Court for the Central District of California challenging the constitutionality of Section 399.⁴ Pacifica is a nonprofit, tax-exempt corporation that owns and operates noncommercial radio stations in five major cities: New York; Los Angeles; Washington, D.C.; Berkeley, California; and Houston.⁵ Following various procedural and jurisdictional complica-

² Indeed, Section 399 permits "the expression of views on public issues by employees of a noncommercial educational broadcast station in their capacity as individuals * * * provided the surrounding facts and circumstances do not indicate that such views are represented or intended as the official opinion of the licensee or its management" (*In re Complaint of Accuracy in Media, Inc.*, *supra*, 45 F.C.C.2d at 302).

³ S. 2883, 95th Cong., 2d Sess. § 404(a) (1978). See pp. 25-26, *infra*.

⁴ The district court did not decide whether the League or Congressman Waxman had standing to bring this action, since their complaint, as ultimately amended, did not seek any relief not also requested by Pacifica (J.S. App. 7a).

⁵ J.S. App. 6a; Dep't of the Treasury, *Internal Revenue Service Pub. No. 78 (Rev. 1-82), Cumulative List of Organizations 764* (1981); CPB, *1982 CPB Public Broadcasting Directory* 21, 22, 25, 39, 47.

tions,⁶ the government urged the court to uphold the constitutionality of the statute at least insofar as it applied to publicly-funded stations.⁷ While the suit was pending, Congress amended the prohibition against editorializing to apply only to those stations that receive CPB funds. Appellees then amended their complaint and abandoned their attack on the portion of the statute forbidding public broadcasters to endorse political candidates; the sole remaining claim was that the ban on editorializing violates the Constitution (J.S. App. 5a).

The district court granted summary judgment in favor of appellees (J.S. App. 21a-22a). It did so on the premise (*id.* at 11a) that "Section 399 can survive scrutiny under the First Amendment only if it meets the standard generally used in First Amendment cases, that is, that it serves a compelling government interest and is narrowly tailored to that end." Observing that "regulations such as § 399 are presumptively unconstitutional" (*ibid.*), the court held that Section 399 was not supported by any compelling government interest (*id.* at 12a-18a).

The court rejected the contention (J.S. App. 11a) that "§ 399 serves a compelling government interest in ensuring that funded noncommercial broadcasters do not become propaganda organs for the government." The court (*id.* at 12a-13a) considered Congress's fear of undue government

⁶ In October 1979, in response to the filing of this suit, then Attorney General Civiletti informed the Senate that the Department of Justice would not defend the constitutionality of the statute, in part because it applied to all public broadcasting stations and not just to those receiving federal aid (J.A. 13). The Senate then adopted a resolution, pursuant to 2 U.S.C. (Supp. V) 288e(a), directing its counsel to intervene as *amicus curiae* and to defend the suit (J.S. App. 3a & n.3). The district court nevertheless dismissed the complaint on the ground that there was no justiciable controversy because the government had decided not to enforce the statute (J.S. App. 4a). In April 1981, while the case was pending on appeal, Attorney General Smith notified the Senate that the government would defend the constitutionality of the statute (J.A. 15-16). The court of appeals remanded the case to the district court; the district court vacated its order of dismissal; and the Senate Legal Counsel withdrew from the litigation (*ibid.*).

⁷ See Defendant's Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Summary Judgment 11-20.

influence resulting from federal funding to be unfounded because "CPB funding in 1977 did not constitute more than approximately 25%" of the budget of the average station receiving such aid and because the amount of CPB funding was being reduced. The court also concluded (*id.* at 13a-14a) that Congress's fear was unfounded because the CPB "is an independent, nonprofit, private corporation"; its "funding decisions are based on objective, nondiscretionary criteria"; and the "fairness doctrine"⁸ prevents broadcasters from presenting "one-sided political propaganda." The court rejected (*id.* at 15a) the government's contention that "restrictions on editorializing are necessary to ensure that government funding of noncommercial broadcast stations will not interfere with the balanced presentation of opinion on those stations," concluding (*id.* at 17a) that "[t]he protections offered by the fairness doctrine effectively eliminate any substantial danger of 'unbalanced' programming."⁹

SUMMARY OF ARGUMENT

This case presents the question whether 47 U.S.C. 399, which prohibits "editorializing" and "support[ing] or oppos[ing]" political candidates by noncommercial broadcasting stations that receive federal subsidies from the Corporation for Public Broadcasting, violates the First Amendment. The term "editorializing" means the expression of views directly by or on behalf of the station's management; the statute does not otherwise restrict expression and in no way prevents controversial public affairs programming.

I

The cardinal teaching of this Court's cases involving freedom of expression in broadcasting is that broadcasting is a special national resource, and that the validity of any challenged regulation must be decided in the context of its unique characteristics and problems. Given the special

⁸ The meaning of the fairness doctrine is discussed at pp. 38-39 & n.70, *infra*.

⁹ The district court "base[d] its decision squarely on the First Amendment" and did not rule on appellees' equal protection challenge to the statute (J.S. App. 19a).

character of noncommercial—"public"—broadcasting, Section 399 is plainly constitutional.

A. Public broadcasting is the product of a national commitment, financed by government, to create broadcast services not provided by the private sector. It operates on scarce and valuable television and radio channels reserved by government for noncommercial use. The federal government provides large subsidies to public broadcasting for construction of facilities, for production of programs, and for station operations. It also provides critical tax subsidies to tax-exempt noncommercial stations. State and local governments also provide substantial subsidies. Direct government subsidies total 59% of public television income and 67% of public radio income.

Units of government and government instrumentalities own more than two-thirds of all public television stations and approximately three-fifths of all public radio stations.

Public television and radio are, in sum, inextricably entwined with government. Created and sustained in order to promote excellence and diversity in broadcasting, they were designed as a community resource—not a private vehicle—to be supported by all and to serve all.

To ensure that public broadcasting fulfills its public mission, it is subject to special restrictions. Public stations may not sell time or accept advertising. They may not operate for profit, may not support or oppose political candidates, and are subject to special rules of financial disclosure, accounting, and employment practices. Congress also has enacted special measures designed to see that public stations broadcast educational and cultural programs, meet the educational and cultural needs of their communities, and maintain strict objectivity and balance in controversial programs and series.

B. Congress has repeatedly manifested its judgment that the public broadcasting system can achieve its purposes only if it refrains from direct partisan interventions in the political arena. More particularly, the legislative history of Section 399 demonstrates Congress's judgment that allowing owners and managers to use public stations to editorialize and electioneer would invite government pressure;

would unfairly devote public moneys to the propagation of private views; would place an official imprimatur on certain views while disfavoring others; and would jeopardize the broad support that public broadcasting needs.

C. This Court's decisions leave ample space for that congressional judgment. The Court has recognized that, in view of broadcasting's special characteristics, the First Amendment permits—indeed, is served by—regulations to insure diversity and fair balance in the use of that medium. Thus, while the right of the print media to be partisan is virtually unlimited, this Court has upheld significant limitations upon the right of all broadcasters to serve private and partisan ends.

D. Public stations constitute a publicly-supported educational and cultural resource for the entire community; their purpose is not to become outlets for the propagation of specific private views. If such stations were permitted to editorialize or electioneer, they would become inviting targets for narrowly based groups hoping to acquire a powerful voice at public expense. And embroilment in partisan political controversies could distract licensees from their public mission and threaten the public support educational broadcasting needs to maintain its independence, its privileged status, and its financial health.

The ban on editorializing also insulates public stations against pressure to become instruments of government propaganda. Government holds the purse-strings, supplying more than 60% of public broadcasting income. It owns the majority of public stations. The danger of government control is, therefore—as Congress has repeatedly found—formidable, and justifies Section 399's protective shield.

The prohibition against editorializing also protects First Amendment values by preventing the use of tax funds to promote private views with which many taxpayers may disagree. "A system which secures the right to proselytize * * * must also guarantee the concomitant right to decline to foster such concepts." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

E. The ban on editorializing interferes only minimally with the free marketplace of ideas. It only prohibits the privileged use of public stations for "official" expressions of opinion by or on behalf of station owners and management. Public broadcasting in fact provides excellent public affairs programming on which a lively and diverse range of views is expressed on many controversial issues. And station owners and managers—like the rest of the public—remain free to express their views by all other means.

II

Section 399 is also constitutional because it represents a valid exercise of Congress's Spending Power. Section 399 does not prevent licensees of public stations from expressing their opinions. It simply provides that the government will not pay for it.

For First Amendment purposes, Section 399 is indistinguishable from Section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C.), which grants a subsidy in the form of tax exemption only to those nonprofit organizations that do not devote a substantial part of their activities to lobbying or propagandizing. In *Regan v. Taxation With Representation*, No. 81-2338 (May 23, 1983), this Court unanimously upheld that measure. The Court found that Section 501(c)(3) does not prevent any organization from exercising its First Amendment rights but merely represents Congress's refusal to pay for those activities out of public funds. The provision at issue here is constitutional for precisely the same reason.

Section 399 is readily distinguishable from situations in which it was held that government improperly denied a person a benefit because he exercised a constitutional right. The measures held unconstitutional in those cases were content-based restrictions adopted to restrain speech rather than to insure that government funds were used for public purposes. In contrast, Section 399 is a content-neutral regulation designed to assure that public funds do not go to subsidize private political and ideological activity.

ARGUMENT

SECTION 399's PROHIBITION AGAINST "EDITORIALIZING" IS A PERMISSIBLE REGULATION OF PUBLIC BROADCASTING STATIONS RECEIVING GRANTS FROM THE CORPORATION FOR PUBLIC BROADCASTING

I. CONGRESS HAS POWER TO ESTABLISH AND FINANCE A PUBLIC NONCOMMERCIAL AND EDUCATIONAL BROADCASTING SYSTEM AND TO REQUIRE THAT SUBSIDIZED STATIONS LICENSED AS PART OF THAT SYSTEM REFRAIN FROM DIRECT EDITORIALIZING AND POLITICAL ELECTIONEERING

This case concerns Congress's power to regulate educational noncommercial broadcasting stations receiving federal government subsidies. It is not a coincidence that these stations are often referred to as *public* broadcasting stations, and that together they constitute the *public* broadcasting system. The very existence of this sort of broadcasting is a product of a national commitment, financed by government funds, to create and sustain broadcast services and programs of a sort not provided by the private, commercial sector of the broadcast industry. Public broadcasting stations exist in order to serve as a special community resource—not in order to benefit their owners, either by enriching them or by giving them special power and influence.

Ever since Congress undertook a serious national program to create and sustain a public broadcasting system, it has manifested its considered judgment that the system can achieve its purposes only if it remains, in some sense, nonpartisan and nonpolitical. This judgment is an integral part of the scheme that Congress set on foot when it created and funded the system. The judgment is manifested in the provision at issue in this case, which in effect provides that the owners and managers of federally-funded noncommercial educational stations may not use those stations to engage in direct partisan interventions in the ideological and political arena.

The district court's decision, invalidating this provision, seriously interferes with the congressional plan for public broadcasting. It simply sets aside Congress's judgment that allowing public stations to editorialize would interfere with the rendering of the services they were designed to provide. And it flatly overrules Congress's judgment that public broadcasting must be protected from the political pressures that would be evoked by partisan interventions into the political and ideological arena.

The district court's decision also ignores the central lesson of this Court's decisions about the meaning of the First Amendment in the context of broadcasting. That lesson is that broadcasting as a whole is a special national resource, the wise use of which requires and justifies governmental umpiring of a sort that may be inappropriate—because inapposite—in other contexts. The cardinal teaching of this Court's broadcast cases is that the validity of Congress's regulatory judgments must be decided contextually, in the framework of an understanding of the special problems and promises of this medium—rather than on the basis of a wooden application of abstract rules derived from other settings. This principle should, of course, be seen as even more telling when the subject of regulation is public broadcasting, which depends so heavily on a public judgment to reserve space for and fund specific kinds of broadcast services. Nevertheless, the district court dealt with Section 399 without reference to context, as if it were any other statute “restricting the discussion of public issues” (J.S. App. 9a).

This Court has decided numerous and well-known cases involving commercial radio and television, and is fully familiar with that industry and with the doctrines defining the permissible scope of its regulation. By contrast, the Court has decided few cases involving noncommercial broadcasting and has not had occasion to define the extent to which government may regulate its activities in light of its special history, character, and needs. We believe that understanding Section 399 and the role it plays in effectuating the congressional plan for public broadcasting requires an understanding of how this part of the broadcast universe developed, how it is sustained, and by whom it is

controlled. We therefore open this part of our brief with an account of the public broadcasting system ("A"). We then outline the history of Section 399 and sketch the legislative materials that cast light on its purposes ("B"). Part "C" shows that this Court's cases provide a doctrinal framework that gives ample space for Section 399. Part "D" then provides a detailed analysis of the significant public purposes that justify that provision. We conclude in Part "E" by demonstrating that the effects of Section 399 in restraining speech are minimal.

A. The public broadcasting system was publicly created and is publicly supported to be a community resource¹⁰

The public broadcasting system developed haltingly over the first 50 years of its existence. It assumed its present form when Congress made a major national commitment by enacting the Public Broadcasting Act of 1967, Pub. L. No. 90-129, 81 Stat. 365, 47 U.S.C. (& Supp. V) 390 *et seq.*

1. Educational institutions have operated radio stations since 1919.¹¹ By 1934, the Federal Radio Commission had issued nearly 300 licenses to educational institutions. Most of these licensees had, however, met insuperable financial difficulties and had assigned their licenses to commercial stations;¹² only 2% of outstanding licenses were held by noncommercial stations.¹³

In 1934, Congress passed the landmark Communications Act. In connection with that Act, Congress considered whether to reserve 25% of all AM radio facilities for stations operated by nonprofit organizations. See 78 Cong. Rec. 8828-8829 (1934). Congress decided, however, not to

¹⁰ For comprehensive accounts of the noncommercial public broadcast system, we refer the Court to the two landmark reports on that system sponsored by the Carnegie Corporation: Carnegie Commission on Educational Television, *Public Television: A Program for Action* (1967) ("*Carnegie I*"), and Carnegie Commission on the Future of Public Broadcasting, *A Public Trust* (1979) ("*Carnegie II*").

¹¹ S. Frost, *Education's Own Stations* 464 (1937).

¹² Note, *The Legal Problems of Educational Television*, 67 Yale L.J. 639, 642 & n.14 (1958).

¹³ 78 Cong. Rec. 8829 (1934).

deal with this matter by legislation; rather, the issue was left to the FCC. The Commission, in turn, conducted hearings but determined not to act (*FCC Report Pursuant to § 307(c) of the Communications Act 5* (1935)).

After the Second World War, the Commission recognized that noncommercial broadcasting could not flourish without special protection. In 1945, therefore, it decided to allocate 20 FM radio channels exclusively for educational use.¹⁴ More important, in 1952—before the first educational television station went on the air¹⁵—the Commission reserved 242 television channels for educational broadcasting, including 80 on the VHF band.¹⁶ The critical importance of this step cannot be exaggerated. Without it, there is little doubt that virtually all of the scarce and lucrative VHF channels in major markets would have been occupied by commercial broadcasters.¹⁷ (The UHF band was relatively insignificant until after 1962, when Congress required that all new sets be capable of receiving both VHF and UHF.¹⁸ And even today, UHF outlets continue to be much less desirable than VHF stations).¹⁹ As a result of the reservations, VHF edu-

¹⁴ FCC, *Report of Proposed Allocations from 25,000 Kilocycles to 30,000,000 Kilocycles* 77 (1945).

¹⁵ *Carnegie I*, *supra*, at 21.

¹⁶ *Sixth Report and Order*, 41 F.C.C. 148 (1952).

¹⁷ In the then ten largest cities, commercial stations had taken all available VHF channels in seven (New York, Philadelphia, Los Angeles, Detroit, Baltimore, Cleveland, and Washington, D.C.). Bureau of the Census, *Statistical Abstract of the United States 1976*, at 23-24; *Sixth Report and Order*, 41 F.C.C. 148 (1952). Except for New York, all these cities still lack a noncommercial VHF outlet. CPB, *1982 CPB Public Broadcasting Directory* 67, 69, 74-75, 80; RCA Broadcast Systems, *Television & Cable Factbook* 1014, 1046 (1982-83 ed.). A non-commercial VHF station for the New York City area was established in 1962 when an educational broadcasting organization bought a commercial station in Newark, N.J., for \$5.75 million. *Carnegie II*, *supra*, at 315-316; E. Barnouw, *The Image Empire—A History of Broadcasting in the United States 197-198* (1970).

¹⁸ See All Channel Receiver Act, Pub. L. No. 87-529, Sections 1 and 2, 76 Stat. 150 and 151 (codified at 47 U.S.C. 303(s) and 330(a)). This legislation "was of crucial importance to noncommercial television" (E. Barnouw, *supra* note 17, at 201). See also *Carnegie II*, *supra*, at 34.

¹⁹ UHF transmitters require much greater power than VHF and are

cational stations came into existence in those major cities (e.g., Boston, Chicago, and San Francisco) where channels were still available.²⁰

Despite the reservation of special channels, educational broadcasting developed slowly. By the mid-1950's, less than half of the reserved television channels had been applied for. Many of these unactivated channels were in communities that could support additional commercial outlets.²¹ The Commission therefore began deleting certain unactivated educational reservations.²²

In 1962, there were only 54 educational TV stations on the air; two-thirds of the population had no access to educational television. S. Rep. No. 67, 87th Cong., 1st Sess. 3 (1961). A Senate report (*ibid.*) attributed this slow progress to the fact that "the problem of fundraising has seemed almost insurmountable in spite of almost herculean efforts on the part of many of our leading educators and civic leaders." The report also concluded (*ibid.*) that "once a station has been built, State legislatures, local educational systems, and local communities raise the funds to produce the programming and operate the stations." Congress therefore enacted the Educational Television Facilities Act of 1962, Pub. L. No. 87-447, 76 Stat. 64, which authorized \$32 million over five years to aid the construction of educational stations. By 1967 when this program expired, 126 educational stations were operating.

less efficient, and UHF reception is generally inferior. *Carnegie II*, *supra*, at 239 n.9.

²⁰ On the following dates, noncommercial VHF stations began operations in major cities. In 1953: KUHT in Houston. In 1954: WQED in Pittsburgh, KQED in San Francisco, KETC in St. Louis, and KCTS in Seattle. In 1955: WGBH in Boston and WPBT in Miami. In 1956: KRMA in Denver. In 1957: WTTW in Chicago, WMVS in Milwaukee, KTCA in Minneapolis-St. Paul, WYES in New Orleans, and KOAC in Portland, Oregon. In 1958: KUED in Salt Lake City. In 1960: KERA in Dallas. In 1961: KAET in Tempe (Phoenix), Arizona. CPB, 1982 *CPB Public Broadcasting Directory* 66, 68, 70, 71, 73, 74, 76, 81, 82, 84, 85, 86; RCA Broadcast Systems, *Television & Cable Factbook* 1014 (1982-83 ed.).

²¹ Note, *supra* note 12, at 646.

²² *Report and Order*, 41 F.C.C. 784, 786 (1956).

In 1967, a Carnegie Corporation Commission created to study educational broadcasting found that there were too few stations and that those in existence were "inadequately staffed, inadequately equipped, and inadequately financed. Deficiencies affect the entire system * * *." *Carnegie I, supra*, at 33 (see note 10, *supra*). The Commission recommended creation of a federally-chartered "Corporation for Public Television" to provide support for noncommercial broadcasting, including funding for program production, and the establishment of "interconnection" facilities to permit nationwide broadcasting of noncommercial programs (*id.* at 36-41). The Commission also recommended that federal funds be distributed to stations to support their general operations, and that a new federally-funded facilities program be started (*id.* at 74-80). To finance these measures without subjecting public broadcasting to political pressures, the Commission recommended a dedicated federal excise tax on the sale of all television sets (*id.* at 68-73).

2. The most important event in the history of noncommercial broadcasting was the enactment of the Public Broadcasting Act of 1967, Pub. L. No. 90-129, 81 Stat. 365, 47 U.S.C. (& Supp. V) 390 *et seq.* Sponsored by President Johnson and incorporating most of the recommendations of the Carnegie Commission, this statute created the public broadcasting system of today. Title I provided new construction grants. Title II created the Corporation for Public Broadcasting, a nonprofit, government-chartered corporation governed by a 15-person board of directors appointed by the President with the advice and consent of the Senate (see 47 U.S.C. (& Supp. V) 396(b)-(f)). The Corporation was authorized to make grants to stations, to fund the production of programs, and to assist in the establishment and development of interconnection systems (47 U.S.C. (Supp. V) 396(g)), such as the subsequently created Public Broadcasting System.²³ Departing from the Carnegie Commis-

²³ The Public Broadcasting System (PBS) "was established by the Corporation for Public Broadcasting and the nation's public television licensees in 1969 as the interconnection service for public television. It was reorganized in 1973 as a membership-supported organization. PBS is responsible for the scheduling, promotion and distribution of the na-

sion recommendation, Congress accepted President Johnson's proposal that the Corporation's funds be drawn from general revenues until the question of financing could be studied further.²⁴ This method of financing has in fact been retained (see 47 U.S.C. (Supp. V) 396(k), as amended by Pub. L. No. 97-53, Title XII, Section 1227, 95 Stat. 727).

Congress's purpose in creating the new broadcasting system was lofty. Public broadcasting was to provide a diversity of educational, cultural, and public affairs programming that commercial stations had failed to furnish. During the late 1950s and 1960s, there was concern that commercial television had settled into a disappointing pattern.²⁵ Public broadcasting, in addition to serving its traditional instructional functions, was to provide a space where excellence and diversity could flourish. It was to educate, broaden, challenge, enlighten, and at times disturb; it was to make history and science and great works of art accessible to a huge new audience. Its goal was not to create a privileged outlet for particular tastes or views, but rather to expand and diversify the audience's experiences.²⁶

tional program service to noncommercial television stations across the country, and for representation of the public television stations' interests at the national level." CPB, *Ten Years of Public Broadcasting, 1967-1977*, at 14 (1977). PBS obtains and distributes programming from member stations and other sources (*ibid.*). National Public Radio, established by CPB in 1971, performs an analogous service for public radio stations (*id.* at 15).

²⁴ *Special Message to the Congress: "Education and Health in America."* 1 Pub. Papers 250 (Feb. 28, 1967); Pub. L. No. 90-129, Title II, Section 201, 81 Stat. 367.

²⁵ See E. Barnouw, *supra* note 17, at 197-198.

²⁶ See *Remarks Upon Signing the Public Broadcasting Act of 1967*, 2 Pub. Papers 474 (Nov. 7, 1967) (remarks of President Johnson); *The Public Television Act of 1967: Hearings on S. 1160 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 90th Cong., 1st Sess. 128 (1967) (Roger L. Stevens, chairman, National Foundation on the Arts and Humanities); *id.* at 173 (Fred Friendly, former president, CBS News); *id.* at 366-367 (James D. O'Connell, White House Director of Telecommunications Management); *Public Television Act of 1967: Hearings on H.R. 6736 and S. 1160 Before the House Comm. on Interstate and Foreign Commerce*, 90th Cong., 1st Sess. 28 (1967) (John W. Gardner, Secretary of HEW); *id.* at 122-123 (James R. Killian, Jr., Carnegie Commission chairman); *id.* at 279-280

To achieve these objectives, Congress could of course have created a federally owned and operated broadcasting network, such as the BBC. Had it done so, it unquestionably could have insisted that the network refrain from editorializing and maintain strict political neutrality. "Government is not restrained by the First Amendment from controlling its own expression." *CBS, Inc. v. Democratic National Committee*, 412 U.S. 94, 139 n.7 (1973) (Stewart, J., concurring); see also T. Emerson, *The System of Freedom of Expression* 700 (1970). However, partly because of fear of the enormous power that a federally-owned network could wield,²⁷ Congress adhered to the tradition of not creating federally owned stations and chose instead to furnish assistance to noncommercial stations owned and controlled by others. But in order to make sure that public broadcasting would remain true to its mission, it was subjected to certain special restrictions and obligations. Most important, public broadcasters were prohibited from selling air time for any purpose whatever—including selling time for political or public affairs presentations.²⁸ Public broadcasting stations were required to be government entities or nonprofit organizations (47 U.S.C. (Supp. V) 397(5) and (7)). "[E]ducational television or radio programs" were defined by the Act as "programs which are primarily designed for educational or cultural purposes" (47 U.S.C. 397(9)), thereby limiting both the types of programs that the Corporation could fund and the activities of the stations it assisted (47 U.S.C. (Supp. V) 396(g)(2)(B) and (C)).²⁹ The

(Julian Goodman, NBC president); *id.* at 371 (McGeorge Bundy, Ford Foundation president); *id.* at 377-379 (Fred Friendly); *id.* at 446 (William G. Harley, president of National Association of Educational Broadcasters); *Carnegie I*, *supra*, at 13, 17-18, 92-99.

²⁷ See pp. 22-25, *infra*.

²⁸ See 47 U.S.C. (Supp. V) 397(7); 47 C.F.R. 73.503(d) (radio); 47 C.F.R. 73.621(e) (TV). In 1981, Congress added 47 U.S.C. (Supp. V) 399a, as amended by Pub. L. No. 97-35, Title XII, Section 1230, 95 Stat. 730, which reiterates the ban on advertisements and specifically prohibits political or public affairs advertisements.

²⁹ A House provision that would have prohibited mere "amusement" or "entertainment" was struck by the Conference Committee. H.R. Conf. Rep. No. 794, 90th Cong., 1st Sess. 13 (1967).

Corporation was instructed to facilitate the development of a public broadcasting system with "strict adherence to objectivity and balance in all programs or series of programs of a controversial nature" (47 U.S.C. (Supp. V) 396(g)(1)(A)).³⁰ In the provision at issue here, noncommercial stations were forbidden to editorialize or endorse or oppose political candidates. Finally, stations receiving CPB funds were made subject to audit by the General Accounting Office (47 U.S.C. (Supp. V) 396(e)).³¹

The activities of noncommercial broadcasting stations are also significantly restricted as a consequence of the fact that virtually all of those not owned and operated by governmental entities are qualified for tax exemption under Section 501(c)(3) of the Internal Revenue Code (see 47 U.S.C. (Supp. V) 397(5) and (7)), and thus may not devote a substantial amount of their activities to "carrying on propaganda, or otherwise attempting, to influence legislation."

The 1967 Act initiated a period of substantial growth in public broadcasting. The number of noncommercial television stations has grown from 126 to more than 290;³² the

³⁰ Cf. *Accuracy in Media, Inc. v. FCC*, 521 F.2d 288, 297 (D.C. Cir. 1975) (provision is "set of goals to which the Directors of CPB should aspire," "not a substantive standard, legally enforceable by agency or courts") (footnote omitted); compare Canby, *The First Amendment and the State as Editor: Implications for Public Broadcasting*, 52 Tex. L. Rev. 1123, 1161 (1974).

³¹ In succeeding years, additional restrictions have been imposed. Recipient stations not owned by governmental entities are required to establish "community advisory board[s]" that are "reasonably representative of the diverse needs and interests of the communities" they serve. These boards must be permitted to review the stations' programming goals, service, and significant policy decisions. The boards must advise the stations whether they are meeting community educational and cultural needs and may make recommendations. 47 U.S.C. (Supp. V) 396(k)(9). Recipient stations are subject to stringent accounting (47 U.S.C. (Supp. V) 396(e)) and financial disclosure (47 U.S.C. (Supp. V) 396(k)(5)) requirements, and special equal employment opportunity rules (47 U.S.C. (Supp. V) 398(b)). The meetings of their governing bodies must generally be open to the public (47 U.S.C. (Supp. V) 396(k)(4)).

³² CPB, *Annual Report 1981*, at 3.

number of noncommercial radio stations qualified for CPB grants from 73 to 238.³³ In fiscal 1969, Congress appropriated approximately \$9 million for the CPB. Pub. L. No. 90-129, Title II, Section 201, 81 Stat. 367. In fiscal 1983, the figure was \$172 million.³⁴ In 1969 public television stations broadcast an average of 56 hours per week; by 1981 that figure was 98.7 hours per week.³⁵

Despite this growth, it is important to remember that public broadcasting stations remain a scarce and valuable resource. Most major cities have at least three commercial television stations; few have more than a single public station.³⁶ There are still only 111 public VHF TV stations in the entire country, as compared with 527 commercial VHF stations.³⁷

3. Public broadcasting's entanglements with and dependence on government are abundantly clear.

Funding. In fiscal 1981, 60.4% of public broadcasting's total income came from federal, state, or local government. CPB, *Public Broadcasting Income Fiscal Year 1981*, at 8 (1983). The federal government's contribution (25.2%) was the largest, followed by that of state governments (18.8%), state colleges (10.6%), and local governments (5.8%). *Ibid.* Public television, whose revenues dwarf those of public radio,³⁸ received 59% of its income from government; federal

³³ CPB, *Annual Report 1981*, at 3. Only full-service radio stations are qualified for CPB grants. CPB, *Policy for Public Radio Station Assistance* (1981). See p. 26 and note 54, *infra*.

³⁴ Executive Office of the President, Office of Management and Budget, *Appendix to the Budget for Fiscal Year 1984*, at I-VI4.

³⁵ CPB, *Annual Report 1981*, at 3.

³⁶ Of the 25 largest cities, only six (New York, Los Angeles, Washington, D.C., Boston, San Francisco, and Milwaukee) have two public stations, and virtually none of the smaller cities has more than one. CPB, *1982 CPB Public Broadcasting Directory* 66-88; Bureau of the Census, *Statistical Abstract of the United States, 1982-83*, at 22-24. Even in cities with two public stations, programming between the two is often duplicative. Public radio stations are overwhelmingly concentrated on the FM band. CPB, *1982 CPB Public Broadcasting Directory* 18-50.

³⁷ FCC News Release (Mar. 14, 1983).

³⁸ In fiscal year 1981, public television received 80% of all public

funds constituted 23.7% of total income. *Id.* at 9. Public radio derived 66.8% of its income from government; 31.7% came from federal sources. *Id.* at 10.

In fact these figures understate governmental contributions to public broadcasting. In the year ending October 1981, more than 25% of the CPB's television subsidies were devoted to funding television program production and distribution. CPB, *Annual Report 1981*, at 28-29. These funds are, of course, indirect subsidies to stations that would otherwise have to bear full production and distribution costs.

Other federal departments and agencies also finance the production of television shows supplied to public stations at no cost or at less than cost.³⁹ The Department of Education, which finances production of such popular programs as *Sesame Street* and *The Electric Company*, has determined that nearly one-fifth of the programs aired on the average noncommercial station are produced with its funds.⁴⁰

Private donations, which constituted 14.4% of public broadcasting income in fiscal year 1981,⁴¹ are themselves governmentally stimulated by the "matching fund" principle: CPB appropriations are based in part on the amount of nonfederal revenues received by public stations.⁴² Even

broadcasting income. CPB, *Public Broadcasting Income Fiscal Year 1981*, at 8-10 (1983).

³⁹ See, e.g., Pub. L. No. 97-35, Section 561, 95 Stat. 469 (Department of Education).

⁴⁰ Letter from Department of Education to James L. Loper, president of KCET, reprinted in Br. for Petitioner Community Television of Southern Calif. at 1a, *Community Television of Southern California v. Gottfried*, Nos. 81-291, 81-799 (filed Feb. 22, 1983); S. Katzman & N. Katzman, *Public Television Programming Content by Category Fiscal Year 1978* (1979).

⁴¹ CPB, *Public Broadcasting Income Fiscal Year 1981*, at 8 (1983). In addition to the 60.4% contributed by government and the 14.4% from private subscriptions, business contributed 11.3%, foundations 2.5%, colleges other than state colleges 2.5%, and all others 6.3% (*ibid.*).

⁴² 47 U.S.C. (Supp. V) 396(k)(1)(B) and 47 U.S.C. (Supp. V) 396(k)(1)(C), as amended by Pub. L. No. 97-35, Title XII, Section 1227(a), 95 Stat. 727. See also 47 U.S.C. (Supp. V) 396(k)(6)(B)(ii), as amended by Pub. L. No. 97-35, Title XII, Section 1227(d), 95 Stat. 729.

more important, virtually all noncommercial stations are exempt from federal tax, and contributions to those stations are deductible for federal income, estate, and gift tax purposes (26 U.S.C. 170(c), 2055(a), 2106(a), 2522(a) and (b)). See *Regan v. Taxation With Representation*, No. 81-2338 (May 23, 1983), slip op. 3 ("Both tax exemptions and tax-deductibility are a form of subsidy that is administered through the tax system.").

Ownership. More than two-thirds of the public television stations now in existence are licensed to governmental entities.⁴³ Many are licensed to state authorities or commissions whose members are public officials or persons appointed by the governor with the approval of the legislature.⁴⁴ Other licenses are held by counties, municipalities, school boards, and public colleges and universities.

⁴³ CPB, *1982 CPB Public Broadcasting Directory* 66-88; RCA Broadcast Systems, *Television & Cable Factbook* 1007-1059 (1982-83 ed.).

⁴⁴ State-owned public television is generally managed by authorities or commissions comprised of public officials or political appointees. In many states, the governor appoints commission members with the advice and consent of the state senate. *E.g.*, Ala. Code § 16-7-2 (Cum. Supp. 1982) (Alabama Educational Commission comprised of seven members appointed by governor with advice and consent of senate); see Alaska Stat. § 44.21.025 (1980); Ark. Stat. Ann. § 80-3902 (1980); Hawaii Rev. Stat. § 314-2 (1976); Wyo. Stat. § 9-3-1102 (1977).

In some states, the legislature joins the governor in actually naming members to the commission. *E.g.*, Or. Rev. Stat. § 354.115 (Repl. 1981) (Oregon Commission for Public Broadcasting comprised of five members appointed by governor, three members appointed by President of the Senate, and three members appointed by Speaker of the House); see Cal. Gov't Code § 8811 (1980); N.C. Gen. Stat. § 143B-426.9 (Cum. Supp. 1981); 71 Pa. Cons. Stat. Ann. § 1188.2 (Purdon Cum. Supp. 1982); S.C. Code Ann. § 59-7-10 (Law. Co-op. 1977).

Many other states combine appointed members with specified public officials who are members *ex officio*. *E.g.*, N.J. Stat. Ann. § 48:23-4 (West Cum. Supp. 1982) (New Jersey Public Broadcasting Authority comprised of five cabinet officers and ten other members appointed by governor with advice and consent of Senate); see Ky. Rev. Stat. Ann. § 168.040 (1980); La. Rev. Stat. Ann. § 17:2503 (West 1982); Mass. Gen. Laws Ann. ch. 65 (1982); Neb. Rev. Stat. § 79-2102 (1981); N.D.

The ownership of full-service public radio stations is also dominated by government-affiliated entities. Of the 262 stations qualified to receive CPB assistance, 58% are licensed to such bodies.⁴⁵

In sum, the entire noncommercial broadcasting system as it now exists is, in a very special sense, public. Without substantial sustained public support it would never have developed, and without that support it would almost certainly wither.

B. Congress enacted and retained the prohibitions of Section 399 in order to maintain the independence of subsidized public broadcasting from government influence and to serve other important First Amendment purposes

The legislative history of Section 399 makes clear that Congress recognized that the use of public stations for direct editorializing and political endorsements would be incompatible with the public broadcasting system that Congress sought to create—a system dedicated to public

Cent. Code ch. 15-65 (1981); Ohio Rev. Code Ann. § 3353.02 (Page Supp. 1982); Okla. Stat. Ann. tit. 70, § 23-105 (West Cum. Supp. 1982); S.D. Codified Laws Ann. § 13-47-1 (1982); W. Va. Code § 10-5-2 (1976).

A number of states operate public television systems through the state board of education or its equivalent. *E.g.*, Fla. Stat. § 229.805 (1977 & Cum. Supp. 1983) (Florida educational television network operated by State Department of Education pursuant to policies adopted by State Board of Education); see Colo. Rev. Stat. § 22-50-113.7 (Cum. Supp. 1982); Del. Code Ann. tit. 14, §§ 129, 130 (1981); Ga. Code Ann. § 20-2-12 (Cum. Supp. 1982); Iowa Code Ann. § 18.138 (West 1978); Kan. Stat. Ann. § 75-4906 (1977); Mich. Comp. Laws § 15.2090 (1979); N.Y. Educ. Law § 236 (McKinney Cum. Supp. 1982); Tenn. Code Ann. § 49-3853 (Cum. Supp. 1982); Utah Code Ann. § 53-42-1 (1981).

⁴⁵ CPB, *1982 CPB Public Broadcasting Directory* 18-50.

purposes and sustained by public funds.⁴⁶ Direct partisan interventions would create a serious danger of government propagandizing; would unfairly devote public moneys to the propagation of private views; would place an official imprimatur on some views while disfavoring others; and would jeopardize the broad support that public broadcasting needs for its independence and financial health. These concerns were not only expressed in 1967, when Section 399 was enacted, but were reiterated in 1978, when a proposal to narrow the statute was defeated, and again in 1981, when Section 399 was amended so as to apply in part only to stations receiving CPB grants.

1. One of the dominant themes in the legislative history of the 1967 Act was that a viable system of public broadcasting must be independent; public stations are not to become government propaganda organs. Although Congress naturally focused primarily on the dangers of federal control, concern was also expressed about control by other governmental bodies.

⁴⁶ Appellees would have this Court believe (Br. in Opp. 20 n.13) that Congress enacted Section 399 solely for the illegitimate purpose of "suppress[ing] potentially critical public comment" concerning its members. Appellees cite (*ibid.*) three isolated statements taken out of context from the congressional debates. These statements do not support the argument. Congressman Keith was making the valid point that an administration film promoting its legislative program could have been used against opposing congressmen (113 Cong. Rec. 26391 (1967)). The broadcasting of such federal government propaganda on public stations is just the mischief that Section 399 was designed to prevent. Congressman Joelson (113 Cong. Rec. 26391 (1967)) was discussing slander, which is not protected speech. His remarks were spurred by a colleague's question whether the government could be sued by a private citizen for slander broadcast by a publicly-funded station; he may have meant that "the right of editorializing should be very, very carefully scrutinized" for that reason (*ibid.*).

In any event, these isolated remarks are of little import. "[I]nquiry into legislative motive is often an unsatisfactory venture. * * * What motivates one legislator to vote for a statute is not necessarily what motivates scores of others to enact it." *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, No. 81-1945 (Apr. 20, 1983), slip op. 23; see also *United States v. O'Brien*, 391 U.S. 367, 383 (1968).

In recommending passage of the 1967 Act, President Johnson stressed that "[n]on-commercial television and radio in America, even though supported by federal funds, must be absolutely free from any federal government interference over programming" (*Special Message to the Congress: "Education and Health in America,"* 1 Pub. Papers 250 (Feb. 28, 1967)). At the beginning of the Senate subcommittee hearings, the chairman, Senator Pastore, stated: "I intend to see * * * every possible safeguard written into the legislation necessary to assure complete freedom from any Federal Government interference." *The Public Television Act of 1967: Hearings on S.1160 Before the Subcomm. on Communications of the Senate Comm. on Commerce, 90th Cong., 1st Sess. 9* (1967) (hereinafter "*1967 Senate Hearings*"). A chorus of witnesses and Senators echoed this view,⁴⁷ and several witnesses expressed concern about the adequacy of the bill's safeguards against such interference. The most important concern was that the administration proposal did not provide for a dedicated tax to fund the CPB; instead, it provided (at least initially) for funding from general appropriations.⁴⁸ Concern was also expressed about the fact that the members of the CPB board were to be appointed by the President.⁴⁹

The Senate committee, in reporting favorably on the bill, stated that the committee was satisfied that the bill would

⁴⁷ See, e.g., *1967 Senate Hearings*, at 93 (Rosel H. Hyde, FCC chairman); *id.* at 172-173 (Fred Friendly, former CBS news president); *id.* at 197 (John F. White, president of NET); *id.* at 219 (Jack G. McBride, general manager of Nebraska ETV Network).

⁴⁸ See, e.g., the criticisms of Fred Friendly and Senator Javits, *1967 Senate Hearings*, at 173, 451-452.

⁴⁹ See, e.g., *1967 Senate Hearings*, at 130 (Roger L. Stevens, chairman of the National Foundation on the Arts and the Humanities); *id.* at 449 (Sen. Javits).

The committee sought to remedy this feature by providing for Presidential appointment of nine of the 15 members, with the nine Presidential appointees to elect the remaining six; See S. Rep. No. 222, 90th Cong., 1st Sess. 13 (1967); 113 Cong. Rec. 12990 (1967) (remarks of Sen. Pastore). This provision was eliminated from the final version of the Act, with the House substituting the requirement that not more than eight of the members could belong to the same party (see 47 U.S.C. (Supp. V) 396(c)).

not lead to "Government control or interference in programming" (S. Rep. No. 222, 90th Cong., 1st Sess. 11 (1967)).

2. The House was equally concerned that government propagandizing not infect public broadcasting. It added Section 399 to the bill as an additional safeguard.

It is notable that, at the House hearings at which the ban on editorializing and political endorsements was suggested, leaders in the field of educational broadcasting themselves argued against these practices. Asked whether any of his member stations broadcast editorials, the president of the National Association of Educational Broadcasters replied emphatically: "They have not, they do not, and they will not." *Public Television Act of 1967: Hearings on H.R. 6736 and S. 1160 Before the House Comm. on Interstate and Foreign Commerce, 90th Cong., 1st Sess. 513 (1967) (hereinafter "1967 House Hearings")*. See also *id.* at 416, 449, 596-597, 641, 731, 747, 804. The director of the New York City Broadcasting System, noting that his station was directly answerable to the mayor, stated (*id.* at 731): "If we were to take an editorial position, it would necessarily have to be that of the administration, and therefore we take none." The representative of the Joint Council on Educational Telecommunications expressed concern about "the control of the facilities so that [they do] not become the implement of those who might use [them] to advance one political philosophy or another in a biased manner." *Id.* at 623.⁵⁰ Another witness stated that since public stations were "using, in many cases, tax moneys," they had "a responsibility to the general public for the expenditure of these funds" (*id.* at 514). It was also noted that editorializing might alienate public support (*id.* at 514,

⁵⁰ An educational station manager explained that his station felt that editorializing was inconsistent with its role as a representative of the entire community (1967 House Hearings, at 516):

[T]he board feels that it is representing the whole public. It is drawing funds from all segments of the public. It simply doesn't feel it has any right to impose an opinion of a group or an individual on this general public.

596), and jeopardize the stations' tax exempt status (*id.* at 514, 596, 641).

Noting the testimony that educational stations did not editorialize or wish to do so, the House report stated that the prohibition against editorializing had been added "[o]ut of an abundance of caution" (H.R. Rep. No. 572, 90th Cong., 1st Sess. 20 (1967)).⁵¹ The House left no doubt that its primary motivation was the concern, "shared by all members of the committee," "that the proposed Corporation could become an instrument for political propaganda" (113 Cong. Rec. 28383 (1967) (remarks of Rep. Staggers, chairman of House Comm. on Interstate and Foreign Commerce)).⁵²

3. Congress reiterated the same concerns in 1978 when the Senate defeated an Administration proposal⁵³ to restrict the editorializing ban to those stations "licensed to any governmental agency or instrumentality" (S. 2883, 95th Cong., 2d Sess. § 404(a) (1978)). In a speech that elicited no disagreement, Senator McClure recalled that Section 399 had been adopted to prevent noncommercial broadcasting from becoming "a partisan political tool" and because the CPB's bipartisan board of directors had not been viewed as sufficient protection. He noted: "As we all know,

⁵¹ See 1967 House Hearings, at 513 (remarks of Rep. Van Deeren); *id.* at 643 (remarks of Rep. Ottinger).

⁵² Committee Chairman Staggers, explaining the distinction between editorializing by commercial and noncommercial stations, stated (1967 House Hearings, at 721) that in the latter case "there is both the use of a public resource and the use of Government funds for financing" (113 Cong. Rec. 26383 (1967)). See also *id.* at 26394 (remarks of Rep. Brotzman); *id.* at 26387, 26407 (remarks of Rep. Springer); *id.* at 26397 (remarks of Rep. Fascell); 1967 House Hearings, at 417 (remarks of Rep. Carter) (CPB, governed by presidential appointees, provided insufficient protection).

⁵³ President Carter stated that the "ban makes sense for stations licensed to a state or local government instrumentality. * * * * Another step toward journalistic independence would be for state and local governments to better insulate these stations. *The danger of undue political control is as real here as at the Federal level.*" *Public Broadcasting System: Message to the Congress*, 2 Pub. Papers 1743 (Oct. 6, 1977) (emphasis added). The Administration proposal was passed by the House (124 Cong. Rec. 19932, 19937 (1978); see also H.R. Rep. No. 95-1178, 95th Cong., 2d Sess. 31 (1978)) but not the Senate (124 Cong. Rec. 15439 (1978)). The House conferees receded (H.R. Conf. Rep. No. 95-1774, 95th Cong., 2d Sess. 35 (1978)).

there have been instances when Public Broadcasting has been criticized for exhibiting bias and a woeful lack of objectivity in its programming." He stated that it was fundamentally unfair to use tax money to propagate controversial private views and that editorializing would jeopardize public broadcasting's "popular acceptance" and financial support. Finally, he observed that "public broadcasters are, themselves, not unanimous or enthusiastic in their support for this proposed change." 124 Cong. Rec. 30058 (1978).

Senator Hollings touched on many of these points. He stressed that "we do not want a Government propaganda agency funded by the taxpayers' dollars," and that "if we allow editorializing or sponsorship of political candidates, it could be the death knell of public broadcasting." 124 Cong. Rec. 30059 (1978).

4. Finally, in 1981, the prohibition against editorializing was amended so as to apply only to those stations receiving CPB grants. This amendment had little practical significance. In 1981, the last year for which such figures are available, all public television stations received CPB grants, as did 214 (or 90%) of the 238 qualified radio stations. CPB, *Annual Report 1981*, at 3-4. The principal result of the 1981 amendment was therefore to exempt those noncommercial radio stations ineligible for CPB aid; these are generally small stations that have low-power transmitters, employ fewer than five full-time employees, or broadcast fewer than 18 hours per day.⁵⁴

⁵⁴ See note 33, *supra*. It is to these relatively insignificant stations that appellees refer when they state (Mot. to Dismiss or Affirm 20 n.13) that before 1981 Section 399 "applied to the hundreds of noncommercial broadcasters that received absolutely no federal funding."

The legislative history suggests that Congress did not even consider these small radio stations when Section 399 was enacted in 1967. Both President Johnson and Congress focused primarily on television. Indeed, as originally introduced the legislation was entitled the Public Television Act and called for the creation of the Corporation for Public Television. See S. 1160, 90th Cong., 1st Sess. (1967). And Congress believed—correctly—that all public television stations would receive CPB grants. See 113 Cong. Rec. 26416 (1967). Contrary to appellees' contention (Mot. to Dismiss or Affirm 6 n.2), there is nothing to suggest that Congress believed that "not all local noncommercial broadcasting stations would receive CPB funding."

During the consideration of the 1981 amendment, Congress reaffirmed its commitment to the purposes served by Section 399. It was again noted that the prohibition alleviated political pressure on publicly funded stations and prevented their use for government propaganda.⁵⁵ The particular problems posed by government-owned stations were also stressed again. Referring to "the Denver television station * * * owned by the local school board," Congressman Aylward observed: "One can imagine the kind of conflicts the station would get into if they were allowed to editorialize for candidates for public office."⁵⁶

The impropriety of using tax dollars for partisan or ideological proselytizing was reiterated. Congressman Moorehead stated:

There is nothing in the First Amendment that guarantees that the Federal Government will give one person a bigger horn than someone else for the exercise of his rights.

When we pay for public broadcasting we are giving them a tremendous voice. If they are going to be allowed to editorialize with Federal money then they have a tremendous advantage over other points of view that may be just as valid.^[57]

⁵⁵ Congressman Tauke stated:

It occurs to me * * * if the Des Moines Register in my own state were receiving public funds its editorial policy would be substantially different or otherwise, it * * * probably would no longer be relying on those Federal funds.

If it were relying on public funds, it could not speak as it does about Members of Congress, members of the Iowa Legislature.

May 11, 1981 Tr. 37 of *Markup of Public Broadcasting Legislation by the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce, 97th Cong., 1st Sess. (1981)* (hereinafter "*May 11, 1981 House Markup*").

⁵⁶ May 6, 1981 Tr. 75 of *Markup of H.R. 3238 by the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce, 97th Cong., 1st Sess. (1981)*. See also *Hearings on H.R. 3238 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce, 97th Cong., 1st Sess. 10 (1981)* (hereinafter "*1981 House Hearings*"); see also *1967 Senate Hearings*, at 10.

⁵⁷ *May 11, 1981 House Markup*, at 39; see also *1981 House Hearings*, at 65-66 (remarks of Rep. Swift).

Members also suggested that editorializing might jeopardize public support of noncommercial stations⁵⁸ and that editorials by public stations might be viewed as official pronouncements.

C. This Court has consistently recognized that the special character of broadcasting justifies special regulations designed to preserve the public interest in diversity and fairness in broadcasting

1. The district court committed fundamental error by requiring the government to show that Section 399 rested on (what the court could be persuaded was) a "compelling interest." In doing so, the court failed to heed a consistent line of Supreme Court precedent holding that First Amendment analysis in this context must take into account the special characteristics of broadcasting. See, e.g., *CBS, Inc. v. FCC*, 453 U.S. 367, 394-397 (1981); *FCC v. Pacifica Foundation*, 438 U.S. 726, 742 n.17 (1978); *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 799-800 (1978); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 791 n.30 (1978); *CBS, Inc. v. Democratic National Committee*, *supra*, 412 U.S. at 101; *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388 (1969). As the Court stated in *CBS, Inc. v. Democratic National Committee*, *supra*, 412 U.S. at 101:

[T]he broadcast media pose unique and special problems not present in the traditional free speech case. Unlike other media, broadcasting is subject to an inherent physical limitation. Broadcasting frequencies are a scarce resource; they must be portioned out among applicants. All who possess the financial resources and the desire to communicate by television or radio cannot be satisfactorily accommodated. The Court spoke to this reality when, in *Red Lion*, we said "it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." *Id.* at 388.

⁵⁸ May 11, 1981 House Markup, at 36; 1981 House Hearings, at 65.

The very right to broadcast depends on a government license to be exercised in the public interest. Broadcast frequencies are both scarce and uniquely powerful;⁵⁹ there is therefore a special public interest in assuring that the airwaves are not monopolized by a narrow range of interests and views. (Special regulations to guarantee diversity in broadcasting—such as restrictions (going beyond general antitrust requirements) on the right of newspaper owners to obtain broadcast licenses—are justified on this ground. See *FCC v. National Citizens Committee for Broadcasting*, *supra*.) The fact that the government entrusts licensees with “a valuable and limited public resource” (*CBS, Inc. v. Democratic National Committee*, *supra*, 412 U.S. at 101) creates a special tension between the privileges of licensees and the rights of the public, one that the Court has resolved by holding that “[i]t is the right of the viewers and listeners, not the right of the broadcasters,

⁵⁹ It has been suggested that recent technological advances—such as cable TV and direct satellite reception—have ended the days of scarcity in access to broadcasting channels. See Note, *The Public Broadcasting Act: The Licensee Editorializing Ban and the First Amendment*, 13 U. Mich. J. L. Ref. 541, 553 (1980). The fact is, however—as every resident of the District of Columbia knows—that, though much talked about, the day when most viewers have access to these new technological marvels still lies in the uncertain future. For most viewers, television still consists, *first*, of the two or three or four VHF stations accessible to the community, and, *second*, of a few additional UHF outlets. The fact of scarcity is, of course, vividly recognized by that most realistic of measurements, the market. A VHF station license in an urban market commands a staggering price; channel 5 in Boston was sold in 1982 for \$220 million. *Broadcasting/Cablecasting Yearbook 1983*, at C-91. There is acute competition for even UHF licenses in major markets. A UHF license in the San Bernardino Valley was recently revoked; 40 competing applications were received for that channel. FCC Public Notice, *TV Broadcast Applications Accepted for Filing and Notification of Cut-Off Date for San Bernardino*, California (May 18, 1983).

Further, it is clearly for Congress in the first instance to determine whether and when technological changes warrant a major restructuring of our system of broadcast regulation. Congress's determination that—as of now—broadcast licenses still constitute a special public resource to be used for the public interest is surely not unwarranted.

which is paramount." *Red Lion Broadcasting Co. v. FCC*, *supra*, 395 U.S. at 390. "[W]hat is essential is not that everyone shall speak, but that everything worth saying shall be said" (*CBS, Inc. v. Democratic National Committee*, *supra*, 412 U.S. at 122, quoting A. Meiklejohn, *Political Freedom* 26 (1948)).

Thus, in First Amendment cases involving regulation of broadcast licensees, the Court has not demanded proof of a compelling government interest of the kind conventionally demanded in other First Amendment contexts.⁶⁰ It has recognized that "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail * * *" (*Red Lion Broadcasting Co. v. FCC*, *supra*, 395 U.S. at 390); it has tested restrictions placed upon broadcasters in the context of the special public interest in a diverse broadcasting system free from domination by a narrow set of interests. See *Red Lion Broadcasting Co. v. FCC*, *supra*, 395 U.S. at 386-392; *CBS, Inc. v. Democratic National Committee*, *supra*, 412 U.S. at 121-132; *FCC v. Pacifica Foundation*, *supra*, 438 U.S. at 744-751; *CBS, Inc. v. FCC*, *supra*, 453 U.S. at 394-397. In conducting this "delicate balancing of competing interests" (*id.* at 394), the Court has accorded "great weight to the decisions of Congress * * *." *CBS, Inc. v. Democratic National Committee*, *supra*, 412 U.S. at 102; see also *Fullilove v. Klutznick*, 448 U.S. 448, 472 (1980).

⁶⁰ Compare, e.g., *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, No. 81-1839 (Mar. 29, 1983), slip op. 7 (state tax that singles out the newspaper press for special treatment cannot withstand First Amendment scrutiny in the absence of "an overriding governmental interest"); *Carey v. Brown*, 447 U.S. 455, 461-462 (1980) (statute excluding all non-labor picketing in residential neighborhoods cannot stand unless necessary to serve a compelling state interest and statute is narrowly tailored to achieve that interest); *First National Bank of Boston v. Bellotti*, *supra*, 435 U.S. at 786 (state statute unconstitutional unless state can meet its burden to show that the challenged restriction is narrowly drawn to serve a compelling state interest). See generally *Perry Education Ass'n v. Perry Local Educators' Ass'n*, No. 81-896 (Feb. 23, 1983), slip op. 7-8 (discussion of traditional "public forum" cases).

2. More specifically, this Court has sustained important restrictions upon the right of all broadcasters to editorialize—and has done so without demanding proof of a “compelling” government interest.

This is particularly significant because, in the print media, the right to editorialize is of course virtually unrestricted. A newspaper has no legal duty to act in the public interest; it does not have to serve the public. A newspaper may print editorials or decline to do so. If it editorializes, it may select the topics of its choice. It may remain mute on important issues, while dwelling on subjects of little interest to most persons. It may stridently advance a single point of view; it may not be compelled to cede space for reply to those it attacks. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). Subject to narrow restrictions, it may advocate the most extreme measures. And in making factual assertions, it is bounded only by the laws of libel and slander. Cf. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

On the other hand, a broadcaster's rights are hedged on all sides.⁶¹ Broadcast licenses may be denied or revoked if the Federal Communications Commission determines that “the public interest, convenience, and necessity” require. 47 U.S.C. 309(a); *FCC v. WOKO, Inc.*, 329 U.S. 223, 229 (1946). And in making this determination, the Commission takes into consideration a broadcaster's coverage of public affairs.⁶²

⁶¹ Indeed, at one time, all broadcasters were forbidden to editorialize. See *In re Mayflower Broadcasting Corp.*, 8 F.C.C. 333, 340 (1940) (“[A]s one licensed to operate in a public domain the licensee has assumed the obligation of presenting all sides of important public questions * * *. The public interest—not the private—is paramount.”). The Commission lifted this ban, not because it believed it to be unconstitutional, but because it concluded that “overt licensee editorialization, within reasonable limits and subject to the general requirements of fairness * * * is not contrary to the public interest.” *In re Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1253 (1949) (emphasis added).

⁶² *CBS, Inc. v. Democratic National Committee*, *supra*, 412 U.S. at 110-112.

Other significant restrictions upon the editorial freedom of broadcasters were upheld in *Red Lion Broadcasting Co. v. FCC*, *supra*. In that case, the Court sustained the constitutionality of FCC regulations granting a right to reply (a) "[w]hen during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group" or (b) "[w]here a licensee, in an editorial * * * opposes a legally qualified candidate" (395 U.S. at 373-375). By implication, the Court also upheld the broader "fairness doctrine" on which these rules are based. As the Court has explained (*CBS, Inc. v. Democratic National Committee*, *supra*, 412 U.S. at 111), that doctrine imposes two affirmative responsibilities upon all broadcasters: "coverage of issues of public importance must be adequate and must fairly reflect differing viewpoints." The Court further stated in *Red Lion* (395 U.S. at 391) that the FCC's personal attack and electoral opposition rules were "indistinguishable" "[i]n terms of constitutional principle" from the equal-time rule (47 U.S.C. 315) under which a candidate for public office is entitled to broadcast time equal to that furnished to his adversary. The Court concluded that all these broadcasting regulations are consistent with the First Amendment's purpose of "preserv[ing] an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than * * * countenanc[ing] monopolization of that market, whether it be by the Government itself or a private licensee" (395 U.S. at 390).

In sum, all broadcasters have been validly subjected to public responsibilities that prevent use of their stations for unrestrainedly private or partisan ends. In the case of federally funded public broadcasters, Congress has imposed even more careful limitations—among them Section 399's ban on editorializing and on supporting or opposing political candidates. In our view, the special characteristics of non-commercial broadcasting justify the specific prohibitions contained in Section 399.

D. The bar on editorializing and electioneering is an essential element of the congressional plan to create and finance a public broadcasting system devoted to public, not private, purposes

1. The measures the government has adopted to create and foster public broadcasting during the past 50 years—the reservation of a limited number of channels for noncommercial and educational broadcasting; the allocation of these channels throughout the nation; the licensing of numerous noncommercial stations to state and local entities, educational institutions, and broadly based community and nonprofit organizations; the funding of construction of facilities; the production and distribution of educational programming; and the massive financing of noncommercial station operations—represent a national commitment to an important public purpose: the creation and fostering of a special broadcasting system that would give the nation a kind of programming excellence and diversity that the commercial sector could not or would not produce. The counter-vailing restrictions Congress has imposed on these special stations—including those contained in Section 399—are designed to serve the same generous public purpose. Non-commercial stations, even more than commercial ones, are to be a community resource. They are to be funded by all—through federal and state and local taxes and through tax-deductible contributions. And they are to serve all. They constitute a forum where many voices are to be heard but none is to be preferred and none may be “official.” It has always been central to this vision that these public stations should not be dedicated to the propagation of particular partisan and ideological views. Any breach of this principle, as Senator Hollings noted, “could be the death knell of public broadcasting” (124 Cong. Rec. 30059 (1978)).

If editorializing and other partisan political interventions were permitted, public stations would become an inviting target for capture by private interest groups that hope to acquire a powerful voice—at public expense. The fact that the number of public stations is limited—especially in the case of television—makes this concern especially acute. In

most cities the one public TV station is an absolutely unique community asset; it would certainly be highly disturbing if its owners and managers, financed by tax dollars, could use it to propagate partisan ideological ends. This concern would be compounded if numerous educational stations were to be captured by groups representing a narrow set of ideological interests. This Court has recognized that the maintenance of diversity is especially important in the broadcast media;⁶³ allowing noncommercial stations to serve partisan ends would put strains on this important interest and might eventually involve the FCC in ideological issues when licensing noncommercial stations.

Even more important is the point that allowing educational station owners and managers to use the station to propagate their own partisan ends is wholly irrelevant to, and might seriously interfere with, the public mission for which these stations are licensed and federally funded. That mission is not to serve as a privileged outlet for the political and ideological opinions of station owners and managers, but to provide the public with a special sort of diverse and excellent programming unavailable on commercial radio and TV. That mission includes, of course, the airing of the multitude of lively and controversial public affairs programs—programs on which every possible view may be freely expressed—that have so notably enlivened public radio and television since the beginning, notwithstanding the ban on editorializing. Carrying out that educational mission is a full time job, difficult and often controversial in its own right. Embroilment in partisan political controversies could only distract from that central mission. It could also compromise the broad public support that educational broadcasting desperately needs in order to maintain its independence, its privileged status, and its financial health. Support for educational broadcasting—just like support for many schools and universities—would rapidly erode if these institutions were perceived as serving nar-

⁶³ *E.g.*, *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 794-802 (1978) (in interest of diversification, FCC may deny broadcast license to owners of newspaper in same community); *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

row partisan ends. To compromise the public role of public broadcasting by allowing it to be exploited for partisan ends would endanger this noble enterprise.

2. The ban on editorializing is also justified because it protects against the use of public stations for government propagandizing. That this is an important government interest can scarcely be denied; "it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas." *FCC v. Pacifica Foundation*, *supra*, 438 U.S. at 745-746 (opinion of Stevens, J.; footnote omitted).⁶⁴

Congress specifically found that if public stations were permitted to editorialize, they might feel pressure to broadcast editorials acceptable to those who hold the purse strings. Similarly, if publicly funded stations became associated with particular editorial positions, it would be difficult to prevent political considerations from influencing decisions regarding the appropriation and distribution of such funds.

The district court's opinion, disagreeing with the considered judgment of three Congresses that Section 399 is necessary to insulate public broadcasting from governmental pressures, furnishes no valid basis for striking it down. The court first stressed (J.S. App. 13a) the "modest level" of CPB funding. It noted (*id.* at 12a-13a) that the average station affected by Section 399 received not more than approximately 25% of its 1977 operating budget from CPB; that no such station depended on CPB for more than 33% of its budget; and that only 14% of appellee Pacifica's revenue was allegedly derived from CPB grants.⁶⁵

⁶⁴ Cf. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974) (plurality) (city transit system may refuse to permit political advertisement to prevent appearance of "favoritism"); *United Public Workers v. Mitchell*, 330 U.S. 75, 97 (1947) ("principle of required political neutrality for classified public servants"). See also *Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1148-1149 (D.C. Cir. 1978) (en banc) (Leventhal, J., dissenting).

⁶⁵ There is no formal proof in the record concerning the amount of funding received by the Pacifica stations from government sources. In their Memorandum of Points and Authorities in Support of Motion for Summary Judgment at 18, appellees asserted that of Pacifica's total

The flaws in this reasoning are manifest. When enacting Section 399, Congress made the predictive judgment that CPB funding, whatever its exact level, would be sufficient to create an unhealthy possibility of government control; that judgment is entitled to respect. The constitutionality of Section 399 cannot be tied to the accidents of current levels and trends of federal funding; otherwise the statute's validity would vary from year to year as funding waxes and wanes.

Further, it is not for the court to make a de novo judgment whether 33%, or 25%, or 14% is substantial. For all the district court knows, a 14% decrease in net income may spell bankruptcy for some public broadcasters. For many more, the result could be a significant curtailment of operations, with losses of jobs, salary cuts, and other consequences. The federal government is the largest single source of funding for public broadcasters. See pp. 18-20, *supra*. Congress determines what the exact level of funding should be; its judgment that the potential for influence is substantial should not have been set aside.

The district court also completely ignored the danger of political pressure by state and local governments and their instrumentalities. These sources account for more than 35% of public broadcasting's income (*ibid.*); they own more than two-thirds of all public stations. There thus exists an obvious potential for abuse. And, in fact, instances of political pressure upon the programming of governmental licensees are common enough that in 1981 the National Association of Educational Broadcasters published a collection of case studies (R. Schenckan, C. Thurston & A. Sheldon, *Case Studies in Institutional Licensee Management*

1978 revenues of "nearly \$2 million," "14% came from CPB Community Service Grants" and "8% * * * came from direct federal grants." Appellees did not assert how much they received from CPB in other forms or how much they received in indirect federal aid or from state and local government. In response to a request for more detailed funding figures, appellees' counsel later stated that "Pacifica is reluctant to release any more financial information than is absolutely necessary" but asserted that in fiscal 1981 "between 20-25% of Pacifica's gross operating budget [came] from CPB grants" (see Appendix to Defendant's Supplemental Memorandum on Amendment of Section 399 (Sept. 14, 1981), App., 2a, *infra*).

(1980)).⁶⁶ Similarly, a survey of public television stations to determine whether they would editorialize if allowed to do so reported that "managers of state-licensed stations, some of which receive sizeable appropriations, responded that [the potential impact of editorials on their sources of funding] would be a 'very important' factor in their decision." Wollert & Haney, *Editorializing and Fundraising: Does It Mix?* 7 Pub. Telecommunications Rev., No. 5, at 34, 36 (Sept./Oct. 1979).⁶⁷

⁶⁶ See also *Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1114-1115 (D.C. Cir. 1978) (executive director of Maryland Center for Public Broadcasting stated "it would be unlikely that his viewers would see a program highly critical of the Maryland General Assembly, since the Assembly is the source of two thirds of the system's funding"); Lucoff, *The University and Public Radio: Who's in Charge?*, 7 Pub. Telecommunications Rev., No. 5, at 22-26 (Sept./Oct. 1979) (account of administration control of programming at state university radio station; concludes (at 26) that "[s]olving the problem of insulating the programming process from those who supply the funding has defied the best minds in public broadcasting"); Thurston, *Insulation and Institutional Licensees*, 8 Pub. Telecommunications Rev., No. 2, at 10-14 (Mar./Apr. 1980).

⁶⁷ In recognition of these dangers, some—but by no means all—states have enacted laws to prevent the use of publicly owned stations for partisan purposes. See Fla. Stat. § 229.905(4) (1977 & Cum. Supp. 1983) (crime to use educational television to support political candidate); Ky. Rev. Stat. Ann. § 168.100(2) (Bobbs-Merrill 1980) (prohibits political propaganda or "image or message in the interests of any political party or candidate for public office"); La. Rev. Stat. Ann. § 17.2506 (West 1982) (prohibits presentation of "biased or one-sided aspects of partisan politics" or advocating or opposing any political candidacy or legislation); N.J. Stat. Ann. § 48:23-9 (West Cum. Supp. 1982) (prohibiting support of or opposition to political party or candidate or attempting to influence enactment of legislation); N.Y. Educ. Law § 236 (McKinney Cum. Supp. 1982) (state charter may be revoked if station used for partisan or political purposes or to influence legislation); Okla. Stat. Ann. tit. 70, § 23-102 (West Cum. Supp. 1982) (crime for elected official to influence or attempt to influence public television program content for personal gain or political benefit); R.I. Gen. Laws § 16-28-3 (1981) (prohibits sponsorship of any individual's election); S.D. Codified Laws Ann. § 13-47-17 (1982) (state board must assure that facilities not used to broadcast propaganda or influence legislation).

The district court also suggested (J.S. App. 13a) that the fear of government influence was "speculative" because of the "protective insulation" provided by the CPB.⁶⁸ As we have noted, Congress wrestled with the problem of structuring the CPB board so as to provide such insulation; it ultimately concluded that additional measures were required. In our view, the courts should not second-guess Congress's judgment about the adequacy of the insulation provided by the CPB or the appropriate combination of means for achieving this obviously legitimate objective.⁶⁹

Finally, the district court placed reliance (J.S. App. 14a) on the fairness doctrine. It is important to remember, however, that the fairness doctrine is itself a significant limitation on the right to editorialize, and has essentially the same constitutional grounding as Section 399. Both provisions reflect the judgment that unrestrained partisanship by broadcast licensees may threaten First Amendment

These laws show that some legislatures perceived the danger that state-owned stations might be used for partisan ends. Ironically the broad language of some of them, which contrasts with Section 399's narrow prohibition against editorializing, creates the danger of authorizing the control of program content by politically appointed state broadcasting authorities.

⁶⁸ While appellees now contend that the present system "ensure[s] that CPB-funded stations will not be vulnerable" to political influence (Mot. to Dismiss or Affirm 19; emphasis added), during debate on the 1978 amendments to the Public Broadcasting Act, appellee Waxman stated that the Corporation is "composed of political appointees" (124 Cong. Reg. 37037 (1978)) and added (*ibid.*): "Further steps must be taken * * * to provide a greater degree of insulation for both [public broadcasting's] funding sources and programming decisions."

⁶⁹ The district court relied (J.S. App. 13a) on the fact that CPB grants are distributed according to "objective, nondiscretionary criteria." This statement is a considerable over-simplification. See, e.g., 47 U.S.C. (Supp. V) 396(g)(2)(B) (discretionary grants to stations for program production). The district court cited a passage in the second Carnegie Commission report noting that the system by which federal funds were allocated among stations was "'well positioned to avoid review of program content as a condition for increased funding'" (J.S. App. 14a n.8, quoting *Carnegie II*, at 124). The court failed, however, to note the Commission's conclusion that in actual practice "the purpose of [the plan]—the insulation from annual political review of the system—has been undermined." *Carnegie II*, at 125-126.

values, see *Red Lion Broadcasting Co. v. FCC*, *supra*: to invalidate one because the government happens currently also to be utilizing the other is inconsistent and substitutes ad hoc policy judgments for constitutional doctrine. Moreover, the fairness doctrine has a limited scope, and Congress had a reasonable basis for concluding that additional safeguards are needed against the use of public stations for government propagandizing.⁷⁰

3. The prohibition on editorializing serves an additional important interest, one not discussed by the district court: it prevents the use of taxpayer money to promote private views. The First Amendment protects "both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). This Court held in *Abood v. Detroit Board of Education*, 431 U.S. 209, 234 (1977), that a city board of education could not require teachers, as a condition of employment, to pay union dues insofar as these dues were used by the union to express political views, to support political candidates, or to advance other ideological causes "not germane to its duties as collective-bargaining representative" (*id.* at 235; footnote omitted). The Court explained (*ibid.*) that the First Amendment prohibited the board "from requiring [a teacher] to contribute to the support of an ideological cause

⁷⁰ The personal attack and political editorial rules (47 C.F.R. 73.1920 and 73.1930) apply only in narrow circumstances. Neither would apply, for example, if a broadcaster simply editorialized on a controversial issue of public importance without attacking any person or group or opposing a candidate. The broader fairness doctrine would in that situation require only that the broadcaster provide a "reasonable opportunity for the presentation of contrasting viewpoints." 39 Fed. Reg. 26372, 26375 (1974). The broadcaster would retain considerable discretion in selecting the opposing spokesman to be heard, the amount of time to be allotted, the time of day at which the presentation would be broadcast, and the format to be employed (*id.* at 26377-26378). The fairness doctrine thus does not purport to put a licensee who editorializes on the same footing as a spokesman for a contrasting view. Furthermore, an editorial endorsed by a "public" station might carry far more weight than any response by a private individual. Finally, the FCC has recently proposed modifying or repealing its personal attack and political editorial rules. *Notice of Proposed Rule Making In re Repeal or Modification of the Personal Attack and Political Editorial Rules*, FCC Gen. Docket No. 83-484 (adopted May 12, 1983).

he may oppose as a condition of holding a job as a public school teacher."

Section 399 supports the same principle. It would be fundamentally wrong to exact tax money from all citizens and then give it to television and radio stations so that the stations can espouse causes with which a great many taxpayers might disagree. "A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts." *Wooley v. Maynard*, *supra*, 430 U.S. at 714. This problem is here magnified by the tremendous power of the broadcast media and by the ironic fact that government-funded "public" television stations may be less answerable to the public than commercial stations dependent upon ratings for advertising revenue.⁷¹

The ban on editorializing also avoids another danger: the appearance that, by providing funds to public stations, the government has endorsed or "prescribe[d] as orthodox" a particular view on the issues. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 645 (1943). See also *Wooley v. Maynard*, *supra* (state may not compel driver to display on license plate a state motto repugnant to his moral, religious, and political beliefs).⁷²

⁷¹ When commercial broadcasters choose to advance their private political, social, and economic views, they are bounded by "the acceptance of a sufficient number of [viewers or listeners]—and hence advertisers—to assure financial success * * *" (*CBS, Inc. v. Democratic National Committee*, *supra*, 412 U.S. at 117 (opinion of Burger, C.J.)). In the case of noncommercial stations, this factor is less important, since private contributions supply only part of their budgets.

⁷² To be sure, in a democracy the very conduct of government necessarily entails some political advocacy: government officials must communicate with the people, explain their programs, and provide leadership and direction to the nation. Members of Congress and the President and his political appointees necessarily participate in forms of political advocacy. And because these communications are "germane to [the officials'] duties" (*Aboud v. Detroit Board of Education*, *supra*, 431 U.S. at 235), they may properly be supported with public funds. But all of that stands on a wholly different footing from the question presented here—whether Congress has power to insist that taxpayer funds not be used to subsidize the propagation of *private* political views that may be unwelcome or even repugnant to many taxpayers.

E. The free marketplace of ideas is not substantially inhibited by Congress's decision that owners and managers of public stations should not have a privileged voice

The restriction on editorializing in Section 399 interferes only minimally with the free marketplace of ideas. As noted, "editorializing" means only the expression of a licensee's views by management or a management spokesman (*In re Complaint of Accuracy in Media, Inc.*, *supra*, 45 F.C.C.2d at 302). Station employees, journalists, academics, polemicists and politicians remain free to express their views. Public figures may be invited to give their opinions or may be interviewed by an interviewer of management's choice. Any news subject may be covered in any manner. Any documentary or show may be aired. In addition, the prohibition against editorializing is strictly neutral; it makes no effort to restrict only those expressions of opinion with which those in positions of authority might disagree. See *Regan v. Taxation With Representation*, *supra*, slip op. 7, 9; concurring opinion at 1 (Blackmun, J.). Finally, the prohibition against editorializing applies only to the use of subsidized broadcast facilities; it does not prevent Pacifica from expressing its views on any other station or in any other medium (including the publications that many noncommercial stations mail to their contributors).

Anyone who has watched public television or listened to public radio knows that they devote substantial air time to public affairs programming; programs such as the *McNeill/Lehrer Report*, *Washington Week in Review*, *Wall Street Week*, *Firing Line*, and *All Things Considered*, provide a broad and lively range of views on diverse and controversial topics.

Moreover, any station that finds the ban on editorializing unduly restrictive is free to decline CPB grants. If such grants really are only an insignificant part of a station's budget—as the district court opined (see J.S. App. 12a-14a)—this should not represent a major sacrifice. If, on the other hand, federal subsidies are critical for a station's operations, management should not complain that it cannot use public funds to express its own views. Station owners and managers subject to Section 399 are, after all, in no

worse position than other persons denied special access to the airwaves to express their views. *CBS, Inc. v. Democratic National Committee*, *supra*. See *Red Lion Broadcasting Co. v. FCC*, *supra*, 395 U.S. at 389 ("as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused"). In arguing that the First Amendment guarantees its right to editorialize on a public station, Pacifica is claiming the right to magnify the force and reach of its opinions through the use of a valuable public resource sustained by public funds and entrusted to it for the purpose of providing a public service. The First Amendment should not be interpreted to give owners and managers of public stations such a privileged voice.

II. CONGRESS HAS POWER TO DETERMINE THAT IT WILL NOT SUBSIDIZE PRIVATE EDITORIALIZING AND ELECTIONEERING

Section 399 is constitutional for another—simple—reason. That provision does not in any way prohibit noncommercial stations from exercising their right to freedom of expression. Congress has merely provided, in the proper exercise of its Spending Power, that it will not subsidize public broadcasting station editorials. "A federal agency providing financial assistance to a public television station may, of course, attach conditions to its subsidy that will have the effect of subjecting such licensee to more stringent requirements than must be met by a commercial licensee." *Community Television of Southern California v. Gottfried*, No. 81-298 (Feb. 22, 1983), slip op. 13.⁷³

⁷³ See also *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980) (opinion of Burger, C.J.).

The fact that two-thirds of all public broadcasting stations are licensed to state authorities, subdivisions of state government, and other government-affiliated entities, gives particular relevance to the line of cases recognizing that "Congress' power to legislate pursuant to the spending power" includes the authority to "fix the terms on which it shall disburse federal money to the States." *Pennhurst State School v. Halderman*, 451 U.S. 1, 17 (1981). In *Oklahoma v. CSC*, 330 U.S. 127 (1947), the Court upheld a provision of the Hatch Act prohibiting partisan political activity by state employees whose principal employ-

To demonstrate the constitutionality of the contested provision of Section 399, it is necessary to look no further than this Court's recent, unanimous decision in *Regan v. Taxation With Representation*, No. 81-2338 (May 23, 1983) ("*TWR*"), holding that Section 501(c)(3) of the Internal Revenue Code (26 U.S.C.) does not abridge the First Amendment. Section 501(c)(3) withholds tax exempt status from a nonprofit organization if a "substantial part" of its activities are devoted to "carrying on propaganda, or otherwise attempting, to influence legislation." Equating the tax exemption granted by that provision to "a cash grant to the organization of the amount of tax it would have to pay on its income" (*TWR*, *supra*, slip op. 3-4), the Court explained (*id.* at 4) that Section 501(c)(3) simply expressed Congress's choice not "to subsidize lobbying as extensively as * * * other activities that non profit organizations undertake to promote the public welfare."

The Court rejected the argument that "the prohibition against substantial lobbying by § 501(c)(3) organizations imposes an 'unconstitutional condition' on the receipt of tax-deductible contributions" (*TWR*, *supra*, slip op. 5). The Court acknowledged that "the government may not deny a benefit to a person because he exercises a constitutional right," but explained (*ibid.*):

The Code does not deny *TWR* the right to receive deductible contributions to support its nonlobbying activity, nor does it deny *TWR* any independent benefit on account of its intention to lobby. Congress has merely refused to pay for the lobbying out of public monies. This Court has never held that Congress must grant a benefit such as *TWR* claims here to a person who wishes to exercise a constitutional right.

Congress has not infringed any First Amendment rights or regulated any First Amendment activity. Congress has simply chosen not to pay for *TWR*'s lobbying.

ment was in connection with a federally-financed activity. Insofar as Section 399 applies to stations licensed to government-affiliated entities, *CSC* is directly controlling.

The reasoning of *TWR* is applicable to the present case.⁷⁴ In neither case did Congress prohibit the exercise of First Amendment rights. In both cases, Congress simply decided not to subsidize private partisanship.⁷⁵

Appellees have argued (Mot. to Dismiss or Affirm 16; emphasis in original) that Section 399 is unconstitutional because it "does not * * * simply restrict the manner in which the noncommercial broadcaster may spend the grant it receives" but "imposes an outright restraint on what the broadcaster may do or say with *any* of its funds." This argument was implicitly rejected in *TWR* and has no greater validity here. The tax exemption provided by Section 501(c)(3) and CPB's unrestricted grants both benefit all aspects of the subsidized organizations. CPB community service grants are used "to produce or purchase programs, hire production staff, buy equipment or make other capital improvements, provide training, promote programs or finance fund-raising activities" (CPB, *Annual Report 1981*, at 7).⁷⁶ Without these grants, there might be no staff mem-

⁷⁴ The concurring opinion in *TWR* also supports the constitutionality of Section 399. The concurrence was based upon the fact that a non-profit organization "may use its * * * § 501(c)(3) organization for its nonlobbying activities and may create a § 501(c)(4) affiliate to pursue its charitable goals through lobbying" (concurring slip op. 2). *Pacifica*—which owns five stations—is free to editorialize on any unsubsidized station while continuing to operate a subsidized one. Moreover, unlike Section 501(c)(3), which applies to lobbying or propagandizing by any means, Section 399 applies only to broadcasting. It does not prevent *Pacifica* from editorializing in any other medium.

⁷⁵ To be sure, Section 501(c)(3) withholds a tax subsidy only if a non-profit organization engages in "substantial" propaganda activities, whereas 47 U.S.C. (Supp. V) 399, as amended by the Public Broadcasting Amendments Act of 1981, Pub. L. No. 97-35, Title XII, Section 1229, 95 Stat. 730, withholds federal funding if a noncommercial broadcasting station engages in any editorializing. However, the principle of *TWR* would just as clearly apply if the statute withheld tax exempt status from any organization that engages in any lobbying. In enacting such a law, Congress would have "simply chosen not to pay for [the organization's] lobbying" (slip op. 5).

⁷⁶ Appellees have argued (Mot. to Dismiss or Affirm 16 & n.9) that CPB grants do not count as federal subsidies. However, those funds are appropriated from the Treasury (47 U.S.C. (Supp. V) 396(k), as amended by Pub. L. No. 97-53, Title XII, Section 1227, 95 Stat. 727), and the mere fact that they pass through the CPB does not prevent

bers to write, edit, or deliver an editorial; no station support staff; no popular programs to attract an audience for the editorial or stimulate private contributions; and no studio, antenna, or other broadcast facilities. As in the case of the tax exemption, the only way to prevent federal funds from subsidizing the activities that Congress wished not to subsidize (lobbying in the case of Section 501(c)(3); editorializing in the case of Section 399) is to ban a subsidized organization from engaging in the activities.

Appellees have also argued (Mot. to Dismiss or Affirm 17) that Section 399 places an unconstitutional condition upon the receipt of CPB funds. But like *TWR*, the present case is readily distinguishable from those in which the government denied a person a benefit because he exercised a constitutional right. Two such cases—*Speiser v. Randall*, 357 U.S. 513 (1958), and *Perry v. Sindermann*, 408 U.S. 593 (1972)—were mentioned in *TWR* (slip op. 5), and they serve to illustrate the distinction. In *Speiser*, taxpayers were denied a property tax exemption for honorably discharged veterans because they refused to sign a declaration stating that they did not advocate the forcible overthrow of the government. In *Perry*, a state college professor was allegedly denied reemployment because he criticized the Board of Regents. Only in the most strained and artificial sense could it be said that the law in *Speiser* prevented government subsidy of taxpayer speech (i.e., the refusal to sign the required declaration). Similarly, in *Perry*, retention of the professor could not be deemed a state subsidy of the teacher's criticisms of the Board.⁷⁷

Congress, in the exercise of its Spending Power, from specifying how they shall be spent. Cf. *CBS, Inc. v. Democratic National Committee*, *supra*, 412 U.S. at 149-150 (Douglas, J., concurring). To hold otherwise would bring down the entire structure of the Public Broadcasting Act, which specifies in some detail how those grants are to be used. See 47 U.S.C. (Supp. V) 396(k), as amended by Pub. L. No. 97-53, Title XII, Section 1227, 95 Stat. 727; H.R. Conf. Rep. No. 97-208, 97th Cong., 1st Sess. 892-894 (1981). Whether CPB grants constitute "federal financial assistance" within the meaning of certain federal statutes (e.g., 20 U.S.C. 1681(a); 29 U.S.C. (Supp. V) 794; 42 U.S.C. 2000d) is not relevant here (compare Mot. to Dismiss or Affirm 16 n.9).

⁷⁷ In this regard, appellees' hypothetical (Mot. to Dismiss or Affirm 17-18) is entirely different from that in our jurisdictional statement (at 10 n.10). The government could not prohibit outside research by a

Speiser and like cases are distinguishable in another critical respect, as this Court noted in *FCC v. National Citizens Committee for Broadcasting*, *supra*, 436 U.S. at 800-801. In that case regulations, prospectively barring newspapers from obtaining broadcast licenses in the same community, were attacked on the ground that they "unconstitutionally condition[ed] receipt of a broadcast license upon forfeiture of the right to publish a newspaper" (*id.* at 800). Rejecting this argument for a unanimous Court, Justice Marshall pointed out (*id.* at 801; emphasis added) that *Speiser* and related cases were inapposite because there denial of a benefit "was based solely on the content of constitutionally protected speech," whereas the challenged regulations were "not content related." Here, of course, Section 399 prohibits all editorializing, without regard to content.

Finally, in *Speiser* and similar cases, the restrictions on speech bore little relationship to the purpose for the government funding; their only aim was to limit expression. In *Speiser*, the purpose of the tax exemption was presumably to reward veterans, an objective unrelated to the desirability of signing the prescribed declaration. And in *Perry v. Sindermann*, *supra*, the purpose of employing the teacher was to provide instruction for students. Restricting speech that did not interfere with the performance of that task obviously did not serve that purpose. Here, by contrast, as we have shown, Congress has consistently determined that the prohibition against editorializing by CPB-funded stations is integral to the purposes it sought to achieve in creating and subsidizing a public broadcasting system.

Section 399, in sum, does not prevent any person or organization from engaging in any form of expression. "Congress has simply chosen not to pay for [public broadcasting

college professor who received a small grant to conduct research in a particular area because, assuming that he properly performed the research called for in the grant, the government would not be financing his other work any more than it would be financing his private life. However, to take a hypothetical more analogous to Section 399, if the government gave him access to a federally financed laboratory for the purpose of doing the grant research, it could legitimately insist that he not use the facility for printing political propaganda pamphlets.

stations' editorializing]" (*TWR, supra*, slip op. 5). This Court should "again reject the 'notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State'" (*id.* at 5, quoting *Cammarano v. United States*, 358 U.S. 498, 515 (1959) (Douglas, J., concurring)).⁷⁸

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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JUNE 1983

⁷⁸ There are many other valid statutes based on the same principle. For instance, Congress has prohibited the unauthorized use of federal funds for lobbying (18 U.S.C. 1913), even though lobbying is protected by the First Amendment. Congress has also prohibited the International Communication Agency (the successor of the United States Information Agency and the Voice of America) from disseminating information within this country (22 U.S.C. (Supp. V) 1461), despite the fact that such a restriction would certainly violate the First Amendment if applied to a private news organization. And 2 U.S.C. 441c prohibits government contractors from making political contributions during the life of the contract even though the First Amendment protects a citizen's right to make such contributions (see *Buckley v. Valeo*, 424 U.S. 1, 22-23 (1976)).

APPENDIX

1. The First Amendment to the Constitution provides in pertinent part:

Congress shall make no law * * * abridging the freedom of speech, or of the press * * *.

2. 47 U.S.C. (Supp. V) 399, as amended by the Public Broadcasting Amendments Act of 1981, Pub. L. No. 97-35, Title XII, Section 1229, 95 Stat. 730, provides:

No noncommercial educational broadcasting station which receives a grant from the Corporation [for Public Broadcasting] under subpart C of this part may engage in editorializing. No noncommercial educational broadcasting station may support or oppose any candidate for political office.

ATTACHMENT A

(Appendix to Defendant's Supplemental Memorandum on
Amendment of Section 399 (Sept. 14, 1981).

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July 13, 1981

Mr. Andrew Tashman, Esq.
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Civil Division, Federal Programs Branch
Department of Justice
Washington, DC 20530

re: *League of Women Voters v. FCC*
Civ. No. 79-1562-MML (Px)

Dear Andrew:

Enclosed is a copy of our Supplemental Memorandum in
Support of Motion for Summary Judgment.

Due to the fact that Pacifica's Director is out of town this
month, I am having some problems getting the detailed
funding figures that you had requested. Moreover, Pacifica
is reluctant to release any more financial information than
is absolutely necessary. Pacifica's chairman, Peter Franck,
has agreed to reveal the following facts: In fiscal year 1981,
between 20-25% of Pacifica's gross operating budget comes
from CPB grants. This is a higher percentage than ever be-
fore; the percentage of the budget derived from CPB funds
has increased a little bit each year. Pacifica has also ob-
tained funds under the National Telecommunications and
Information Agency's facilities program. (For the record,
NTIA was part of HEW until about two years ago when it
became part of the Commerce Department.) Pacifica re-
ceives only a tiny part of its budget from state and local
funding sources. If you require additional information about
Pacifica's funding, please call me.

I would very much appreciate your sending a copy of your reply brief by express mail to Peter Franck at the same time you send us a copy. He is leaving the country on July 24th and would like the opportunity to review your papers before leaving. His address is:

* * * *

Thank you, and I'll talk to you soon.

Very truly yours,

Alletta d'A. Belin

Ad'AB:pmk
Enclosure

SEP 19 1983

ALEXANDER L. STEVAS,
CLERK

No. 82-912

IN THE

Supreme Court of the United States

October Term, 1982

FEDERAL COMMUNICATIONS COMMISSION,

Appellant,

vs.

LEAGUE OF WOMEN VOTERS OF CALIFORNIA, *et al.*,

Appellees.

**ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA**

**BRIEF FOR APPELLEES
LEAGUE OF WOMEN VOTERS
OF CALIFORNIA, ET AL.**

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No. 82-912
IN THE
Supreme Court of the United States

October Term, 1982

FEDERAL COMMUNICATIONS COMMISSION,

Appellant,

vs.

LEAGUE OF WOMEN VOTERS OF CALIFORNIA, *et al.*,

Appellees.

**BRIEF FOR APPELLEES
LEAGUE OF WOMEN VOTERS
OF CALIFORNIA, ET AL.**

JURISDICTION

The jurisdiction of this Court rests on 28 U.S.C. § 1252. However, the Government's failure to have filed its notice of appeal within the time prescribed by Supreme Court Rule 11.3 defeats jurisdiction in this Court. The lack of jurisdiction resulting from the Government's premature, and thus invalid, filing of its notice of appeal is fully discussed in appellees' Motion to Dismiss or Affirm, at 11-13.¹

¹Appellees have little to add on the jurisdictional issue, although two points raised in the Government's Reply Memorandum merit brief response. First, *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445 (1982), has no bearing on the instant question. There, the Court held that a request for attorneys' fees, filed four and one-half months after the entry of a final judgment, did not constitute a "motion to alter or amend" under Fed. R. Civ. P. 59(e). Here, the District Court awarded attorneys' fees in its judgment, following which the Government filed a true Motion to Alter or Amend pursuant to Rule 59(e). As such, the motion

STATEMENT

Appellees brought this lawsuit to vindicate their rights to express and receive the views of noncommercial broadcasters on issues of public importance.² The District Court agreed that the First Amendment guarantees of freedom of speech and freedom of the press are directly and unjustifiably violated by 47 U.S.C. § 399, which prohibits "editorializing" by any noncommercial educational broadcasting station that receives a grant from the Corporation for Public Broadcasting. As the court found, § 399 outlaws speech that lies at the very heart of the First Amendment, and the government interests purportedly served by the statute are far too speculative to support its abridgment of fundamental constitutional rights.

In somewhat paradoxical fashion, however, the Government argues that the "special history, character, and needs" of noncommercial licensees actually demand the *suppression* of their editorial

suspended the finality of the judgment, rendering untimely and ineffective the intervening notice of appeal to this Court.

Second, even though preliminary and final orders holding acts of Congress unconstitutional are immediately appealable under 28 U.S.C. § 1252, it does not follow that such an order may be appealed while a motion to alter or amend is pending in the district court. Rule 59(e) was adopted in order to "make . . . clear that the district court possesses the power" to rectify its own mistakes. Advisory Committee on Rules for Civil Procedure, 5 F.R.D. 433, 476 (1946). This power exists whether the court's ruling is interlocutory or final. For reasons of judicial economy and comity, even an appealable interlocutory ruling must nevertheless be "final," in the sense that the court is not still considering or reconsidering its decision. Accordingly, the fact that jurisdiction in this case lies under 28 U.S.C. § 1252 does not affect the invalidity of the Government's attempt to appeal while its motion to alter or amend was pending before the District Court.

²Appellee Pacifica Foundation is a nonprofit educational corporation that owns and operates noncommercial broadcasting stations in five major markets. Pacifica was founded in 1949 with the explicit objective of providing the public with access to a diverse range of opinions and ideas. See H. Hoffman, *Pacifica and the Idea of Freedom* (1965). Appellee League of Women Voters of California is a nonprofit, nonpartisan organization devoted to promoting political responsibility through the informed participation of citizens in self-government. Appellee Henry Waxman is a United States Congressman and a listener and viewer of noncommercial broadcasting. J.S. App. 6a.

viewpoints in order to further First Amendment values. Appellees therefore begin by reviewing the development and structure of non-commercial broadcasting in this country, in order to demonstrate that § 399 is antithetical not only to the tradition of freedom of speech and a free press, but to the very role that noncommercial broadcasting was designed to serve in our society.

Noncommercial Broadcasting and Section 399

In the beginning, there was noncommercial broadcasting — and only noncommercial broadcasting. In fact, the first four hundred radio stations licensed in this country were all noncommercial.³ Many of them were operated by educational institutions: Some broadcast adult education courses; others enlightened their communities with a variety of programs; but none of these stations sold air time.⁴ The first commercial radio station (WEAF) was inaugurated in August, 1922,⁵ and in the decades that followed, broadcasting attracted a strong following. Although commercial stations soon outnumbered their noncommercial counterparts, many non-commercial stations endured, and their programming provided an important alternative to sponsored broadcasting for millions of Americans.⁶

³E. Barnouw, *The Sponsor: Notes on a Modern Potentate* 9-10 (1978) ("Sponsor"). The first radio station began broadcasting in 1919 from the University of Wisconsin. S. Frost, *Education's Own Stations* 464 (1937).

⁴E. Barnouw, *Sponsor* 12.

⁵*Id.* at 15.

⁶By 1945, noncommercial broadcasting had so established itself that the Federal Communications Commission (FCC) decided to allocate 20 of the 100 frequencies on the new FM spectrum exclusively for noncommercial educational use. 1983 *Broadcasting/Cablecasting Yearbook* A-6 ("1983 Yearbook"). Seven years later, the FCC made a similar assignment of television channels to noncommercial stations in 242 communities. Carnegie Commission on the Future of Public Broadcasting, *A Public Trust* 33-34 (1979) ("Carnegie II"). Although a majority of the noncommercial stations today are licensed to broadcast over these reserved frequencies, many — including WNET in New York City, the largest noncommercial television station in the country — operate on nonreserved channels. In fact, over 125 noncommercial radio and television stations, including two of appellee Pacifica's stations, operate on nonreserved frequencies. 1983 *Yearbook* B-336 to 368, C-79 to 81.

It was not until 1962 that the federal government provided any financial assistance to noncommercial broadcasting. During their first forty years, noncommercial stations had supported themselves through private contributions and funding from state and local governments and educational systems. Most of the early stations had been affiliated with colleges and universities, but the 1950s saw the development of many noncommercial stations that were owned and operated by private, nonprofit community organizations. Deriving much of their income from donations, auctions, and foundation grants, these stations had begun to broadcast programs of more general cultural and educational interest.⁷ With the passage of the Educational Television Facilities Act of 1962, Pub. L. No. 87-447, 76 Stat. 64, Congress recognized the great potential of these stations and attempted to stimulate their growth throughout the country by authorizing the former Department of Health, Education and Welfare (HEW) to distribute \$32 million in matching grants over a five-year period for the construction of noncommercial television facilities.

Thus, on the eve of the landmark 1967 Carnegie Report,⁸ there were already several hundred noncommercial broadcasters "provid[ing] a much needed source of cultural and informational programming for all audiences" H.R. Rep. No. 1559, 87th Cong., 2d Sess. 3 (1962). No stations were operated by the federal government; indeed, they had received only minimal federal funding.⁹ Noncommercial licensees, like their commercial counterparts, operated as independent journalistic entities vested with the broadest discretion to determine the content of their broadcasts — a discretion which they exercised to present informative, innovative, and sometimes controversial programs geared to the specific needs of their community. Only the chronic underfinancing of noncommercial broadcasting darkened its bright future.

⁷E. Barnouw, *Sponsor* 59-61.

⁸Carnegie Commission on Educational Television, *Public Television: A Program for Action* (1967) ("Carnegie I").

⁹Federal assistance to the 124 noncommercial television stations then in operation amounted to barely 5% of their cumulative historical financial support (*Carnegie I*, at 21, 250 (Table II)), and the over 300 noncommercial radio stations had received no federal support at all.

Against this background, the prestigious Carnegie Commission recommended a significant increase in federal assistance to non-commercial broadcasting, concluding that a well-financed educational broadcasting system was imperative in order to provide "all that is of human interest and importance which is not at the moment appropriate or available for support by advertising" *Carnegie I*, at 1. The Commission called upon the federal government to supplement the existing state, local, and private funding of non-commercial broadcasting, so that it could realize its full potential as a truly complementary alternative to the commercial system. *Id.* at 227-34.

The Carnegie Report realized that an expanded federal role in financing "public"¹⁰ broadcasting would require that special care be taken to preserve the two principles underlying the American system of broadcasting: independent local stations serving the needs of their community are the "bedrock" of the system; and the federal government cannot be permitted to interfere with programming content. The Commission therefore recommended the creation of a private, nongovernmental, nonprofit corporation to receive and disburse funds for program production, to shield stations from governmental or political pressures, and to provide leadership for an expanded national interconnection system. *Id.* at 5, 36-41.

The Carnegie Report met with widespread approval, and its proposals were the basis of the Public Broadcasting Act of 1967, Pub. L. No. 90-129, 81 Stat. 365 (codified at 47 U.S.C. §§ 390 *et seq.*). The Act reflected Congress' acknowledgment of the tremendous value of an expanded noncommercial broadcasting system in furnishing a diversity of viewpoints on issues of public concern.¹¹ Titles

¹⁰The Commission coined the term "public" television not to suggest that noncommercial licensees may be subjected to greater government controls than their commercial colleagues, but merely to "dramatize the emphasis on programming for general enrichment and entertainment, as well as for classroom instruction." *Carnegie II*, at 35.

¹¹As the Senate Report concluded: "Particularly in the area of public affairs your committee feels that noncommercial broadcasting is uniquely fitted to offer indepth coverage and analysis which will lead to a better informed and enlightened public." S. Rep. No. 222, 90th Cong., 1st Sess. 7 (1967). It is noteworthy that at the time the Senate Report was written, the bill did not contain a ban on editorializing.

I and III of the legislation set aside over \$38 million to continue HEW's construction grants program for three more years and to finance a study of instructional television. But the heart of the Act was Title II, which authorized \$9 million to create and fund the Corporation for Public Broadcasting (CPB), an independent, non-profit private corporation that would disburse federal and other aid¹² to selected stations and other entities for the production and/or acquisition of educational programming.

Congress took great pains to ensure that the legislation established no inroads on the local licensees' autonomy. Two levels of safeguards were provided: CPB was insulated from the threat of government or political influence, and local stations were protected from any possible coercion by CPB.¹³ Perhaps most important, the funding of local stations was removed entirely from the political process. CPB grants to licensees must be made in accordance with

¹²CPB receives substantial funds from nonfederal sources. For example, in February 1981, CPB was given \$150 million by the Annenberg School of Communications for the support of telecommunications technologies in higher education. CPB, *Annual Report 1981*, at 14.

¹³For example, the Act expressly declares that CPB was created "to afford maximum protection from extraneous interference and control." 47 U.S.C. § 396(a)(7). To guarantee CPB's independence from government control, the Act provides that the Corporation "will not be an agency or establishment of the United States Government" (§ 396(b)), and it prohibits any federal agency or employee from exercising "any direction, supervision, or control" over noncommercial stations, CPB, or any of its grantees (§ 398(a)), or over "the content or distribution" of noncommercial programs and services (§ 398(c)). To ensure that CPB remains free from political influences, the Corporation is governed by a bi-partisan board of directors (§ 396(c)(1)), none of whom can be employed by the federal government (§ 396(c)(2)); no political considerations can enter into its personnel actions (§ 396(e)(2)); and it may not contribute to or support any political party or candidate (§ 396(f)). Furthermore, to protect the autonomy of noncommercial stations, CPB is prohibited from owning or operating any broadcast station, network, interconnection system, or production facility (§ 396(g)(3)(A)), and from producing, scheduling, or disseminating programs to the public (§ 396(g)(3)(B)). In addition, the Act requires the Corporation to carry out its functions "in ways that will most effectively assure the maximum freedom" of local stations from interference with their program content (§ 396(g)(1)(D)).

pre-determined, nondiscretionary objective criteria.¹⁴ In short, the Public Broadcasting Act established a framework that guaranteed as fully as possible the freedom of local stations from government or political influence. Congress relied upon procedural safeguards to ensure that its funds would be spent as intended¹⁵ and eschewed even the slightest intrusion into the licensee's journalistic independence.

But there was one significant exception. In a break from existing law, FCC policy, and broadcasting practice, the Act for the first time imposed restrictions on the content of the station's programming:

No noncommercial educational broadcasting station may engage in editorializing or may support or oppose any candidate for political office.

47 U.S.C. § 399 (1967).¹⁶ Violation of § 399 is punishable by a range of sanctions, including license revocation, denial of license renewal, and imposition of criminal penalties for willful and knowing transgressions. 47 U.S.C. § 501.

The legislative history behind § 399 is sparse. Neither the Administration proposal nor the bill that had passed the Senate contained any such restriction. Not until the House Committee was considering its version did the issue of editorializing arise. Prior to 1967, all

¹⁴The Act specifies how CPB is to divide its appropriations between television and radio, and between stations and program production entities (§ 396(k)(3)(A)). Grants to individual licensees are then made pursuant to a pre-determined mathematical formula based upon objective criteria such as their market size and their share of the total non-federal funding sources in preceding years. See "CSG Eligibility Criteria," in CPB, *1980-81 Comprehensive Community Service Grant Review*.

¹⁵For example, noncommercial stations are subject to special requirements governing recordkeeping and audits (§ 396(1)(3)(B)), financial disclosure (§ 396(k)(5)), and open meetings (§ 396(k)(4)).

¹⁶In 1973, the editorializing ban was redesignated as § 399(a), when Congress added a companion provision, § 399(b), which required non-commercial broadcasters receiving federal funds to make audio recordings of all broadcasts "in which any issue of public importance is discussed." That provision was ruled unconstitutional in *Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102 (D.C. Cir. 1978) (en banc), and was subsequently repealed, returning § 399 to its original enumeration.

stations — whether commercial or noncommercial — had been permitted to editorialize freely.¹⁷ Indeed, the FCC regarded editorializing as an important aspect of the licensee's obligation to broadcast "in the public interest." See *In re Editorializing by Broadcast Licensees*, 13 F.C.C. 1246 (1949) ("*Editorializing Report*"); *Programming Statement*, 25 Fed. Reg. 7295 (1960). Yet in the House deliberations, the right of noncommercial broadcasters to express their own views suddenly came under attack. As Rep. William Springer, § 399's sponsor, explained, "There are some of us who have very strong feelings because they have been editorialized against." Hearings Before the House Committee on Interstate and Foreign Commerce on the Public Television Act of 1967, 90th Cong., 1st Sess. 641 ("*House Hearings*"). When the Senate acceded to the House's addition of § 399, the ban on editorializing became a part of the Act, and the over 500 noncommercial stations then broadcasting — including hundreds that would never receive a penny of federal aid — were barred from airing their viewpoints on all public issues.

Proceedings Below

Appellees filed this action on April 30, 1979. The Department of Justice, representing the FCC, responded by notifying the District Court that it could not and would not attempt to defend the constitutionality of § 399.¹⁸ The Senate, appearing as *amicus curiae*, then

¹⁷The permissibility of editorializing had briefly been placed in doubt by the FCC's decision in *Mayflower Broadcasting Corp.*, 8 F.C.C. 333, 339-41 (1940), which held that a broadcaster's advocacy of its own partisan views to the exclusion of all others did not serve the public interest. Because many viewed *Mayflower* as rejecting licensee editorializing, the FCC shortly thereafter instituted a rulemaking and clarified that broadcaster editorializing was not inconsistent with the public interest as long as an opportunity was provided for the presentation of opposing viewpoints. *In re Editorializing by Broadcast Licensees*, 13 F.C.C. 1246 (1949).

¹⁸Attorney General Civiletti explained:

After careful consideration, we have concluded that Section [399] violates the First Amendment guarantees of freedom of speech and freedom of the press by restricting the ability of public broadcasting stations to comment on matters of public interest. While not every restriction on expression is necessarily unconstitutional, such restrictions must serve some compelling state interest. We have not been

obtained dismissal of the lawsuit for want of a justiciable controversy. While an appeal from that decision was pending, the Department of Justice under the new Administration reversed its position and announced that it would both enforce and defend the challenged statute. The District Court therefore vacated its order of dismissal and recalendared appellees' motion for summary judgment. Before argument could be heard, however, Congress amended § 399 to its present form, separating the prohibition against editorializing from the ban on political endorsements and limiting its scope to those stations that receive grants from CPB.¹⁹ Appellees amended their complaint to reflect this change, challenging only § 399's ban on public-issue editorializing.²⁰

able to identify any compelling governmental interest served by Section [399] which would justify the statute's prior restraint on speech. Furthermore, even if the Department of Justice could fashion an argument that the statute serves a compelling government interest, the statute would still be constitutionally defective on grounds of overbreadth since public broadcasting stations receiving no federal funds are covered. Finally, we have concluded that there are less restrictive means to achieve the suggested purposes of the statute.

The Department of Justice is, of course, fully mindful of its duty to support the laws enacted by Congress. Here, however, the Department has determined, after careful study and deliberation, that reasonable arguments cannot be advanced to defend the challenged statute.

Letter from Attorney General Benjamin R. Civiletti to Senate Majority Leader Robert C. Byrd, October 11, 1979 (J.A. 13-14).

¹⁹The current language of § 399 is set out in Appendix A. The 1981 amendment was not, as the Government suggests, "of little practical significance." Govt. Brief 26. It freed from § 399's concededly unconstitutional restrictions over 800 noncommercial stations that received no federal funds. See Letter from Atty. Gen. Smith to Sen. Thurmond (J.A. 15-16). Of the 1374 noncommercial television and radio stations currently broadcasting (FCC News Release, *Broadcast Station Totals for June 1983* (June 16, 1983)), only 532 received CPB grants in 1981. CPB, *Annual Report 1981*, at 4.

²⁰Because the Government repeatedly refers to its purported interest in preventing "electioneering" and "partisan" editorializing, it is worth emphasizing that the ban on political endorsements is not at issue here. Appellee Pacifica does not contemplate endorsing candidates for political office, and instead seeks only the freedom to express its views on issues of public importance.

On August 6, 1982, the District Court granted summary judgment, declaring § 399's editorializing prohibition unconstitutional. Finding that noncommercial broadcasters were entitled to the full panoply of First Amendment protections, the court held that the Government had failed to establish that § 399 was narrowly tailored to serve a compelling interest. (J.S. App. 17a-18a.) In light of the diverse funding sources of noncommercial stations, the safeguards built into the system to ensure that noncommercial broadcasters remain free of government control, and the fairness doctrine's protection against one-sided presentation of controversial issues, the court found no support for the asserted fear of government propagandizing. (J.S. App. 12a-15a.) Similarly, the court concluded that the alleged interest in fostering the balanced presentation of opinion on CPB-funded stations was not sufficiently compelling to justify § 399's ban on protected speech. (J.S. App. 15a-17a.)

SUMMARY OF ARGUMENT

Section 399 categorically prohibits noncommercial broadcasters that receive grants from CPB from expressing their views on public issues. The statute violates fundamental First Amendment principles by suppressing speech on the basis of its content. By its express terms, § 399 discriminates among different types of speech and bars expression of only one kind — opinions on issues of public importance. Moreover, the statute prohibits only one class of speaker — the CPB-subsidized noncommercial licensee — from communicating its views on these issues.

1.

Section 399's ban on editorializing strikes at the very heart of the First Amendment. By prohibiting the broadcaster from expressing its opinions on public issues, the statute muzzles one of the very institutions that the Constitution selected to inform society and keep it free. Section 399 not only denies the licensee the right to be heard, but it infringes upon the paramount right of the public to receive information from a diverse range of sources.

Nothing in the nature of broadcasting justifies anything but the most stringent First Amendment scrutiny in assessing the constitutionality of § 399. The central teaching of this Court's opinions in the area of broadcast regulation is that the public's right to be informed is best served by maximizing the number and diversity of

viewpoints expressed over the airwaves. Section 399's censorship of the broadcaster's editorial opinion has exactly the opposite intent and effect. Nor does the "special character" of noncommercial broadcasting require suppression of the licensee's views on public issues. Indeed, as the FCC itself has long recognized, the station's expression of its editorial opinion is an essential element in its ability to fulfill what the Government itself asserts to be its intended societal function: to educate, challenge, and at times disturb.

Because the CPB-funded noncommercial broadcaster's editorial speech is fully protected by the First Amendment, § 399 can be upheld only if the Government demonstrates that it is the most narrowly drawn restriction necessary to serve a compelling state interest. Yet the two alternative justifications advanced by the Government are far from compelling, and the statute furthers those purported objectives only marginally at best.

The asserted interest in preventing CPB-funded stations from becoming outlets for the propagation of "private" viewpoints rests on the erroneous premise that Congress "created" noncommercial broadcasting and therefore can shape it in its own image by banning the expression of any controversial views. But Congress did not "create" noncommercial broadcasting any more than it "created" the myriad other communicative enterprises that it subsidizes, from the print media to commercial broadcasting. Moreover, there is no basis for assuming that permitting noncommercial broadcasters to editorialize will lead to the exploitation of their facilities for the propagation of partisan ends. Further, § 399's ban on editorializing bears no relevant correlation to its purported objective: on the one hand, the statute suppresses editorials that cut across partisan lines and pose no danger to the asserted interest; on the other hand, it concededly permits partisan editorials by anyone other than the licensee itself, and it does nothing to prevent bias from infusing any other programming format.

Similarly, the purported interest in preventing noncommercial broadcasting from becoming a vehicle for the dissemination of government propaganda is entirely speculative, and the editorializing ban responds to that concern in an impermissible and irrational manner. As the District Court found, CPB's independent structure and nondiscretionary grant-making procedures, the diversity of the stations and their funding sources, and the fairness doctrine's re-

quirement that coverage of public issues be balanced, combine to ensure that the broadcasters will not be vulnerable to any hypothetical government attempt to influence their editorials. More fundamentally, to silence the broadcaster in order to eliminate the theoretical possibility of government interference with the content of its programming stands the First Amendment on its head. The remedy for any feared imbalance in the marketplace of ideas is more speech, not less speech. Finally, there is no rational relationship between the asserted interest in preventing government propaganda and § 399's ban on all licensee editorials, even those on local issues having no bearing on the federal government.

II.

Because § 399 applies selectively to only one type of broadcasting facility and restricts the speech of only one speaker on one subject matter, it also violates the First and Fifth Amendment guarantees of Equal Protection, for none of the statute's discriminations is even reasonably related to the purported interests behind its ban on editorializing. For example, editorializing by the licensee itself is prohibited, while exactly the same opinions may be voiced by anyone else the station lets on the air. If anything, however, these individual opinions are more "private" than those of the noncommercial licensee; and since the station is concededly free to select who shall speak over its facility, there is no greater danger that the licensee would espouse government propaganda than would its chosen representative. Such irrational discriminations permeate § 399 and undermine the plausibility of the Government's alleged justifications for the editorializing ban.

III.

By requiring the noncommercial broadcaster to forfeit its right to editorialize in order to receive a CPB grant, § 399 also violates the principle that the government may not condition a public benefit on the relinquishment of constitutional rights. Section 399's ban on editorializing is very different from the limits on lobbying by tax-exempt organizations upheld in *Regan v. Taxation With Representation*, 103 S.Ct. 1997 (1983). Section 399 does not merely provide that Congress will not pay for the noncommercial broadcasters' editorial speech; it flatly prohibits them from editorializing even with their own private funds. Section 399 impermissibly forces the

noncommercial broadcaster to choose between retaining its right to editorialize or receiving the CPB grant to which it is entitled for its non-editorializing activities. The statute thus requires the broadcaster to abandon a central element of its First Amendment rights in order to receive its governmental benefit.

ARGUMENT

I. SECTION 399'S BLANKET SUPPRESSION OF THE NON-COMMERCIAL BROADCASTERS' EDITORIAL VOICE VIOLATES THE FIRST AMENDMENT GUARANTEES OF FREEDOM OF SPEECH AND FREEDOM OF THE PRESS.

Section 399 is a direct, government-imposed restraint on the non-commercial broadcaster's freedom to express its views on issues of public importance. The statute categorically proscribes speech occupying the "highest rung of the hierarchy of First Amendment values." *NAACP v. Claiborne Hardware Co.*, 102 S.Ct. 3409, 3426 (1982). Worse yet, § 399 selectively prohibits one class of speaker — the CPB-subsidized noncommercial licensee — from communicating its opinions based solely on the content of that speech. See *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 784-85 (1978) ("Bellotti").²¹

Accordingly, § 399's ban on editorializing is presumptively unconstitutional, and the burden rests squarely on the Government to demonstrate that it is the most narrowly drawn regulation necessary to further a compelling state interest. *E.g.*, *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 294 (1981); *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 540 (1980). It is a

²¹The Government suggests that § 399 is not content-related because its prohibition against editorializing is purportedly viewpoint-neutral. Govt. Brief 41, 46. The identical argument was flatly rejected in *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530 (1980), in which this Court held unconstitutional a state order barring utility companies from including bill inserts that express "their opinions or viewpoints on controversial issues of public policy." *Id.* at 533. The Court there explained:

The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.

Id. at 537-38. Accord, *Carey v. Brown*, 447 U.S. 455, 462 n.6 (1980); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 518-19 (1981).

burden that the Government cannot carry, for any legitimate interests that § 399 allegedly serves are far from compelling, and its absolute prohibition of editorializing is not the least restrictive means of achieving those ends.

A. Section 399 Suppresses Speech That Is Entitled to the Fullest Protection in Our Constitutional Framework.

1. The Noncommercial Broadcaster's Editorial Opinions Lie at the Very Heart of the First Amendment.

Preservation of the free flow of information has long been recognized as the core purpose of the First Amendment.²² The vigorous, open discussion of public issues plays a critical role in our representative system of government. "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) ("*Red Lion*") (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964)). Yet it is precisely this "uninhibited, robust, and wide-open" debate on public issues that § 399 restricts. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

Moreover, in prohibiting the noncommercial broadcaster from editorializing, § 399 silences one of the very institutions whose freedom of speech "is a condition of a free society." *Associated Press v. United States*, 326 U.S. 1, 20 (1945); *Bellotti, supra*, 435 U.S. at 781. The media are the "eyes and ears" of the public, seeking out the news, awakening interest in the conduct of government, offering criticism and proposing changes, and engaging the public in a "dialogue in ideas." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 547 (1976); *Grosjean v. American Press Co.*, 297

²²E.g., *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940) ("The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment"); *Bellotti, supra*, 435 U.S. at 776. The guarantees of freedom of speech and of the press protect not only the individual's interest in self-expression, but the societal interest in the attainment of truth. *Id.* at 777 n.12; *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587 (1980) (Brennan, J., concurring).

U.S. 233 (1936).²³

Because the untrammelled freedom of the media to express its views is so indispensable to its dual societal responsibilities as educator and watchdog, this Court has not hesitated to strike down any attempt to restrict what the media can say and what the public can hear. Thus, in *Mills v. Alabama*, 384 U.S. 214 (1966), the Court invalidated a law that, despite its benevolent purpose, had the effect of prohibiting editorializing on the day of an election. Concluding that it was "difficult to conceive of a more obvious and flagrant abridgment of the constitutionally guaranteed freedom of the press," the Court explained:

Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change, which is all that this editorial did, muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free.

384 U.S. at 219. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

Section 399 suffers from the same constitutional infirmities as the statute in *Mills*. By denying the broadcaster the right to editorialize, § 399 strips the station of one of its most effective means of communicating with the public and contributing to the welfare of the community. See E. Routt, *Dimensions of Broadcast Editorializing* 9 (1974); Brief of *Amici Curiae* CBS, Inc., et al., at 3-5. An editorial educates, explains, and often moves the public to action. It is the vehicle by which the broadcaster can offer the product of its study and suggest alternatives to current policies. Because it represents the considered opinion of a respected institution, the station's viewpoint deserves and receives high regard from the audience. In addition, editorial opinion frequently provokes a response, thereby creating a two-way flow of information that draws

²³Indeed, it has been suggested that the Framers intended the press to be a fourth institution outside the government, serving as a check on the three official branches, and that the press clause was specifically included in the Constitution to ensure that the government could not "convert the communications media into a neutral 'market place of ideas.'" See Stewart, "Or of the Press," 26 *Hastings 'L.J.* 631, 636 (1975). Yet this is what the Government has attempted to do under § 399.

citizens into the affairs of their government. See Fang & Whelan, *Survey of Television Editorials and Ombudsman Segments*, 17 J. Broadcasting 363, 370 (1973).²⁴

Thus, contrary to the very premise of the Government's argument — that editorializing is somehow incompatible with the "public mission" of noncommercial broadcasting — the freedom to express its institutional views on public issues is essential to the noncommercial station's ability to fulfill its intended societal function: "to educate, broaden, challenge, enlighten, and at times disturb." Govt. Brief 15.²⁵ Indeed, the importance of the broadcaster's editorial opinion has long been acknowledged by the FCC itself, "the expert body which Congress has charged to carry out its legislative policy."

²⁴In particular, editorializing by noncommercial broadcasters would promote their value in providing "a diversity of educational, cultural, and public affairs programming that commercial stations had failed to furnish." Govt. Brief 15. Because the noncommercial station often serves a different audience than the commercial station, its editorials are likely to address issues that are of concern to its unique constituency, issues that may not be fully discussed over the commercial airwaves. See Brief of *Amicus Curiae* National Black Media Coalition, at 10-11. Section 399's restraint has therefore impeded noncommercial broadcasting's efforts to assume the role envisioned for it. As the Carnegie Commission concluded in its review of noncommercial broadcasting as it entered the 1980s:

[T]here is one objective that public broadcasting must locate at its center of its activity if it is ever to be considered a mature voice in society. Public broadcasting must have a strong editorial purpose. *Without this strong editorial purpose expressed in diverse, even controversial ways, and without an ability to construct a context for understanding the events that occur around us and the meaning of history, public broadcasting will never be taken seriously.*

Carnegie II, at 29-30 (emphasis in original).

²⁵The Government consistently attempts to mischaracterize responsible broadcast editorializing as the "exploitation" of station facilities "to propagate partisan ideological ends." See, e.g., Govt. Brief 33-35. As explained more fully below, this misrepresentation of the noncommercial broadcaster's editorial opinion is wholly at odds with history, reality, FCC policy, and fundamental First Amendment values.

FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940).²⁶ In its comprehensive review of editorializing by commercial and noncommercial broadcasters, the Commission concluded that "the expression of editorial opinions by broadcast station licensees on matters of public interest and controversy is consistent with their obligations to operate their stations in the public interest." *Editorializing Report, supra*, 13 F.C.C. at 1246. One Commissioner even noted that "governmental prohibition of editorialization by licensees . . . constitutes an unconstitutional abridgment of free speech." *Id.* at 1262 (separate views of Commissioner Jones). Therefore, for the past thirty-five years, the FCC has actively *encouraged* licensee editorializing.²⁷ In fact, while the Government was preparing its brief to this Court, the FCC was reiterating that "licensee editorializing should be encouraged and is no more subject to abuse than other controversial issue programming." *Notice of Proposed Rule*

²⁶This Court's decisions "have repeatedly emphasized that the Commission's judgment regarding how the public interest is best served is entitled to substantial judicial deference." *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981). Consequently, it is significant that the FCC is only the nominal appellant in this lawsuit. The FCC informed the District Court that "no position is taken by the Commission on the constitutional question presented in this case," specifically noting that "[t]he arguments advanced [by the Justice Department] in defense of Congress' constitutional power to enact § 399 do not necessarily reflect the positions taken by the Commission in other areas of policy not mandated by § 399." Defendant's Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Summary Judgment 1-2 n*.

²⁷For example, in its 1960 *Programming Statement*, the Commission included "editorialization by licensees" as one of the fourteen "major elements usually necessary to meet the public interest, needs and desires of the community." 25 Fed. Reg. 7295. The FCC enforces this policy by taking the broadcaster's editorializing practices into account in license renewal proceedings. *E.g.*, *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 860 (D.C. Cir. 1970) ("There is a public interest in diversity in policy areas lit by the lantern of editorial probes."); *RKO General, Inc.*, 44 F.C.C.2d 149, 219 (1969) ("The [licensee's] policy of not presenting editorials runs squarely athwart Commission policy. The Commission assesses demerits for failure to editorialize."); *Miners Broadcasting Service, Inc.*, 20 F.C.C.2d 1061, 1061-62 (1970); *Evening Star Broadcasting Co.*, 27 F.C.C.2d 316, 332 (1971).

Making In re Repeal or Modification of the Personal Attack and Political Editorial Rules, F.C.C. Gen. Docket No. 83-484, at 17 (adopted May 12, 1983) ("1983 Proposed Rulemaking").

In sum, § 399 outlaws exactly that speech to which the First Amendment gives the greatest protection, for it not only abridges the licensee's right to express its views on important public issues — a freedom "indispensable to the discovery and spread of political truth" (*Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)) — but it also infringes upon "the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences." *Red Lion*, *supra*, 395 U.S. at 390. Section 399 stifles the noncommercial broadcaster's editorial voice not just on election day, but each and every day. Its constant and categorical prohibition cannot be reconciled with the guarantees of freedom of speech and the press.

2. The "Special Character" of Broadcasting Mandates the Maximization of the Number and Diversity of Editorial Viewpoints, Not Their Suppression.

There can be no doubt that broadcasting falls within the First Amendment's protection against governmental abridgment of freedom of speech and the press. See, e.g. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948); *CBS, Inc. v. Democratic National Committee*, 412 U.S. 94, 133 (1973) ("*CBS v. DNC*") (Stewart, J., concurring) ("Private broadcasters are surely part of the press."). Television and radio are today the primary source of news and opinion for the majority of Americans. 1983 Yearbook A-2. "In terms of the role of free speech in the functioning of a system of self-government, radio and television broadcasting have taken the place of the stump and the soap box in 1791." Kalven, *Broadcasting, Public Policy and the First Amendment*, 10 J. L. & Econ. 15, 15 (1967).

To be sure, each medium of expression presents somewhat different First Amendment problems. *Joseph Burstyn, Inc. v. Wilson*, 334 U.S. 495, 503 (1952). But as the District Court expressly found, nothing in the "special character" of noncommercial broadcasting "justif[ies] the application of less stringent First Amendment standards in the present case." J.S. App. 10a-11a. In fact, this Court's decisions make clear that the government's "refusal to permit the broadcaster to carry a particular program or to publish his own views

... would raise ... serious First Amendment issues." *Red Lion*, *supra*, 395 U.S. at 396.

The unifying principle in the area of broadcast regulation is that structural limitations of the medium (*e.g.*, spectrum scarcity) may justify restricting the rights of licensees in order to preserve the "paramount" rights of viewers and listeners. *Id.* at 390. But never has this Court suggested that such a rationale could sustain a regulation preventing the broadcaster from airing its own opinions. The First Amendment has always been invoked in the broadcasting context to *expand* the number and diversity of views expressed over the airwaves, not to *limit* the speakers and issues that may be discussed. *See id.* at 390-91; *CBS, Inc. v. FCC*, 453 U.S. 367, 395-96 (1981). The fairness doctrine regulations were upheld in *Red Lion* precisely because they were found to "enhance rather than abridge the freedoms of speech and press" by promoting "the First Amendment goal of producing an informed public capable of conducting its own affairs." 395 U.S. at 375, 392. Section 399's censorship of editorial opinion has exactly the opposite intent and effect.

Furthermore, even when this Court has upheld government regulation deemed necessary to "preserve an uninhibited marketplace of ideas" (*id.* at 390), it has always emphasized that "the broadcasting industry is entitled under the First Amendment to exercise 'the widest journalistic freedom consistent with its public [duties].'" *CBS, Inc. v. FCC*, *supra*, 453 U.S. at 395 (quoting *CBS v. DNC*, *supra*, 412 U.S. at 110). For example, in *Red Lion*, the Court specifically noted that there was "no question here" of "government censorship" or "refusal to permit the broadcaster ... to publish his own views." 395 U.S. at 396. Similarly, in upholding a limited access requirement in *CBS, Inc. v. FCC*, *supra*, the Court stressed that it "does not impair the discretion of broadcasters to present their views on any issue or to carry any particular type of programming." 453 U.S. at 397. *Accord*, *CBS v. DNC*, *supra*, 412 U.S. at 121, 124 (obligation to accept editorial advertisements would be inconsistent with our system of "private, independent broadcast journalism" and would lead to "erosion of the journalistic discretion of broadcasters in the coverage of public issues"); *see also FCC v. Midwest Video Corp.*, 440 U.S. 689, 705 n.14 (1979).

In sum, the Government's unsupported assertion that "this Court has sustained important restrictions upon the right of all broadcasters to editorialize" (Govt. Brief 31) could not be further from the truth. Rather, "[The First Amendment] rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Associated Press v. United States*, *supra*, 326 U.S. at 20. That objective is achieved by maximizing the number of voices heard over the air, not by silencing those who do have access to the microphone.²⁸

B. There Are No Compelling Government Interests to Justify Section 399's Restraint on Free Expression.

Because the noncommercial broadcaster's editorial speech is entitled to the full panoply of First Amendment protections, the Government must show that § 399's ban on editorializing is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. *Carey v. Brown*, 447 U.S. 455, 461 (1980). "Especially where, as here, a prohibition is directed at speech itself, and the speech is intimately related to the process of governing, 'the State may prevail only upon showing a subordinating interest which is compelling,' . . . 'and the burden is on the government to show the existence of such an interest.'" *Bellotti*, *supra*, 435 U.S. at 786. The Government has offered two alternative justifications for the statute, but they are far from compelling.²⁹ Indeed, the structure

²⁸In any event, the "special character" of broadcasting cannot justify § 399, which prohibits editorial comment only by noncommercial licensees and does not apply to commercial broadcasters. "Certainly spectrum scarcity cannot be invoked to support a government attempt to penalize or suppress speech, based on its general content, by some, but not all, broadcast licensees; scarcity hardly serves as a convincing justification where only some licensees are subject to regulation." *Community-Service Broadcasting*, *supra*, 593 F.2d at 1111 n.21.

²⁹The Government has apparently conceded that the concerns to which § 399 is allegedly addressed are not compelling. Having been unable to persuade the District Court that those asserted interests are compelling, the Government now argues that they are only "important." Govt. Brief 21, 34, 35, 39. Thus, if the Court agrees that the broadcaster's editorial opinions are entitled to traditional First Amendment protections, the decision below must be affirmed.

and legislative history of § 399 suggest that the statute was enacted not to further any compelling government interest, but to further an illegitimate congressional self-interest in suppressing potentially critical editorial comment.

1. The Articulated Congressional Desire to Suppress Critical Editorial Comment Is Not a Legitimate Government Interest.

The fundamental principle in First Amendment law is that the government has no legitimate interest in limiting the free flow of information. Thus, "when regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited 'merely because public officials disapprove the speaker's views.' " *Consolidated Edison Co. v. Public Service Comm'n*, *supra*, 447 U.S. at 536 (quoting *Niemotko v. Maryland*, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring in result)). See *Minneapolis Star & Tribune Co. v. Minnesota*, 103 S.Ct. 1365 (1983).³⁰

Examination of the legislative history of § 399 in accordance with this directive reveals that the statute may well have been enacted for an illegitimate purpose, for the only rationale articulated by those considering the provision indicates that it was intended to prevent noncommercial broadcasters from being able to criticize congressional policies and officials. in their editorials. The editorializing ban was inserted by the House Committee "[o]ut of abundance of caution" (H.R. Rep. No. 572, 90th Cong., 1st Sess. 20 (1967)), despite the acknowledgment by its sponsor that "anyone who has had any experience in the past 6 years knows there has not been the slightest control of any kind exercised by the Federal Government in making grants" 113 Cong. Rec. 26407 (remarks of

³⁰This Court has been especially wary of any governmental interference in the editorial process, even when the intent behind legislation restricting freedom of the press appears benign. See *Miami Herald Publishing Co. v. Tornillo*, *supra*, 418 U.S. at 259 (White, J., concurring); *Mills v. Alabama*, *supra*.

Rep. Springer).³¹ What there had been, however, were some Congressmen who were upset by noncommercial broadcasts that they viewed as potentially damaging politically. Certainly, Representative Springer was quite explicit about why he wanted to add § 399: he didn't like commercial broadcasters taking positions on candidates, and he wanted to "close this loophole" that could permit noncommercial stations to emulate their commercial counterparts. 113 Cong. Rec. 26387-88. Similar fears of criticism were voiced by his colleagues in the House.³²

³¹The House Committee Report incorrectly observed that "considerable testimony" had been heard that no educational stations editorialized. In fact, the Committee had heard from several witnesses who stated that noncommercial stations had editorialized in the past and thought it important that they continue to do so. *E.g.*, *House Hearings* at 404 (Utah Gov. Rampton); *id.* at 97 (HEW Secy. Cardner). The witnesses (including the NAEB president cited in the Govt. Brief at 24) did say that noncommercial broadcasters did not intend to involve themselves in partisan issues such as candidate elections. *See, e.g., id.* at 97, 513. It is odd, therefore, that the Government brief repeatedly refers to "partisan" "electioneering" as the evil to be feared, inasmuch as the licensees do not wish to engage in such activities and § 399's provision on candidate endorsements would fully protect against such concerns.

³²*E.g.*, 113 Cong. Rec. 26391 (Rep. Keith: "It is conceivable that [a certain noncommercial television broadcast] could . . . have adversely affected my candidacy for re-election."); *id.* (Rep. Joelson: "Those of us in public office are in a position where newspapers, radio, or TV stations can say anything they wish about us. . . . Therefore, the right of editorializing should be very, very carefully scrutinized."); *id.* at 26399 (Rep. McClure: "Witnesses before the committee not only saw public television as a force for social good, but said it should and will crusade. Crusade for what? I suppose that by the time I have finished this speech, it might well be a crusade for my opponent in next year's election."); *id.* at 26389 (Rep. Devine: "I understand that there is one educational TV station out on the west coast that a bunch of 'hippies' are running. Someone has suggested that it would indeed be amazing to hear the type of analysis they are making. . . . This is one of the areas in which we have had to work very hard in order to try to provide some safeguards.").

Dean W. Coston, then Deputy Undersecretary of HEW and primary drafter of the original legislation, candidly acknowledged the motivation behind the addition of § 399:

Additional evidence that § 399 was not a response to legitimate concerns over the possible effects of federal funding stems from the fact that when enacted, and until its amendment fourteen years later in response to this lawsuit, the prohibition applied to hundreds of noncommercial broadcasters that received absolutely no federal aid. See note 19, *supra*. Contrary to the Government's contention, Congress was certainly aware that not all noncommercial broadcasters would be receiving CPB funds.³³ Furthermore, other provisions of the Act were directed not toward all noncommercial broadcasting stations, as was § 399, but only toward "each recipient of [CPB] assistance," thereby indicating both that Congress recognized that not all stations would be receiving CPB grants, and that it knew how to limit a restriction when it wanted to. See, e.g., 47 U.S.C. § 396(1)(3)(A), as enacted, Pub. L. No. 90-129, 81 Stat. 365 (now § 396(1)(3)(C)) (recordkeeping and audit requirements for recipients of CPB grants).

It thus appears that § 399 was not the product of careful consideration of the imminent dangers posed by licensee editorializing (*cf.*

I don't know where you are going to get good public policy editorializing if you can't get it at the public sector. You certainly aren't going to get it out of the commercial networks, nor do you get it out of very many local commercial stations. So I think that was a mistake, and I told Springer that I thought it was a mistake. I understand his point of view, and I understand his fears that this system could be used to unseat certain members of Congress.

J. Burke, *An Historical-Analytical Study of the Legislative and Political Origins of the Public Broadcasting Act of 1967*, at 209 (1972) (dissertation published by University Microfilms).

³³For example, the Senate Report acknowledges that some 183 noncommercial television and 346 radio stations were then broadcasting (S. Rep. No. 222, 90th Cong., 1st Sess. 2-3 (1967)), yet CPB's annual reports clearly reflect that only a fraction of those stations were receiving grants. See, e.g., CPB, *Public Broadcasting 1969*, at 17, 21 (of the more than 425 noncommercial radio stations, only 73 stations and 15 satellite stations qualified for support); CPB, *Developing a National Resource: Annual Report 1970* ("the limited resources of the Corporation prevent offering a support grant program to all radio licensees"). In fact, the first CPB grant to a station (either TV or radio) was not made until 1969, two years after the ban on editorializing was enacted. "Public Broadcasting: The First 10 Years," 8 CPB Reports No. 24, at 2 (1977).

Fullilove v. Klutznick, 448 U.S. 448, 549-52 (1980) (Stevens, J., dissenting)), but was instead a last-minute political compromise designed to win the support of reluctant Congressmen who may have feared potential criticism from noncommercial broadcasters. As one commentator concluded after reviewing the Act's legislative history: "[T]he purpose of Section 399 was clear: to prevent Congress from creating a monster that might someday turn on its creator. Therefore, to achieve its own self-protective ends Congress simply legislated away a significant part of educational broadcasters' right of free speech."³⁴

2. The Interests Asserted by the Government Cannot Justify Section 399's Ban on Editorializing.

The Government does not contend that it would be permissible for Congress to have enacted § 399 in order to suppress potential criticism. Instead, the Government offers two contradictory justifications for the prohibition against editorializing, arguing on the one hand, that § 399 is needed to prevent the exploitation of non-commercial stations for the propagation of "private" and "partisan" viewpoints, and alternatively, that the statute is needed to prevent the propagation of "government" propaganda. These alleged concerns are entirely speculative, however, finding no support in the record or reality, and they cannot therefore justify § 399's wholesale abridgment of free speech. "Mere speculation of harm does not constitute a compelling state interest." *Consolidated Edison Co. v. Public Service Comm'n*, *supra*, 447 U.S. at 543.

a. The Alleged Interest in Preventing CPB-Funded Stations From Propagating Their "Private" Viewpoints Is Neither Legitimate Nor Compelling.

The first interest advanced by the Government is that § 399 is necessary to ensure that noncommercial stations not be exploited for the propagation of "private" and "partisan" viewpoints. Ac-

³⁴Toohy, *Section 399: The Constitution Giveth and Congress Taketh Away*, 6 Educ. Broadcasting Rev. 31, 34 (1972). The manifest unconstitutionality and troubling legislative history of § 399 have not escaped the attention of courts and other commentators. See, e.g., *Community-Service Broadcasting*, *supra*, 593 F.2d at 1128 n.25 (Robinson, J., concurring); Lindsey, *Public Broadcasting: Editorial Restraints and the First Amend-*

according to this rationale, Congress supposedly intended to create and finance a "special broadcasting system" devoted to "public, not private, purposes." Permitting noncommercial broadcasters to editorialize, it is claimed, would seriously interfere with this "public mission," for the stations would become "inviting target[s] for capture by private interest groups" who would then use them "to propagate partisan ideological ends."³⁵ Not only is this purported justification based on pure speculation, but it wrongly assumes that government has a legitimate interest in prohibiting CPB-funded licensees from expressing their "private" views.

1. The Government's argument proceeds from the erroneous premise that because Congress "created" noncommercial broadcasting, it may therefore impose whatever restrictions it deems necessary to ensure that the stations remain true to their "public mission." But Congress did not "create" noncommercial broadcasting any more than it "created" commercial broadcasting. Noncommercial broadcasting existed before the government ever began to regulate the broadcast spectrum, and it endured and flourished for almost fifty years without a penny of federal aid. Even today, the federal contribution amounts to barely one-fifth of noncommercial broadcasting's income and is less than half the sum raised from

ment, 28 Fed. Com. B.J. 63, 81 (1975); Note, *The Public Broadcasting Act: The Licensee Editorializing Ban and the First Amendment*, 13 U. Mich. J. of Law Reform 541, 548-49 (1980).

³⁵Govt. Brief 33-35. To the extent there was any meaningful consideration given to § 399, nothing articulated in the legislative history supports the proposition that the statute was thought necessary to prevent the propagation of "private" views with taxpayer funds. Rather, this argument appears to have been "fashioned" by Government attorneys seeking a legitimate justification for § 399. See Letter from Atty. Gen. Civiletti to Sen. Byrd, quoted in note 18, *supra*. A rationale that trails its implementing legislation cannot be deemed compelling. See *Talley v. California*, 362 U.S. 60, 64 (1960). Indeed, the Government apparently did not consider this alleged interest important enough to mention in attempting to defend the statute in the District Court. The failure to have raised this argument below is reason enough for this Court not to consider it (see *Dothard v. Rawlinson*, 433 U.S. 323 n.1 (1977)), but in light of Congress' failure to have mentioned it either, this purported rationale surely cannot justify § 399's ban on editorializing.

wholly private, non-governmental sources.³⁶

More important, the fact that the federal government now helps to fund noncommercial broadcasting does not alter the essential character of the medium as "a system of private broadcasters licensed and regulated by Government" in which "broad journalistic discretion" in the discussion of public issues is left with the licensee. *CBS v. DNC*, *supra*, 412 U.S. at 116, 105 (opinion of Burger, C.J.); *FCC v. Midwest Video Corp.*, 440 U.S. 689, 703 (1979). Noncommercial broadcasting is not a domestic Voice of America. Rather, it is simply a category comprising the over 1400 independently operated broadcasting stations that are licensed to nonprofit educational organizations.³⁷ The noncommercial broadcaster has as great a right to express its "private" viewpoints as its commercial counterpart has.

In fact, CPB grants to noncommercial broadcasters are but the tip of the iceberg of the federal government's subsidization of com-

³⁶CPB, *Public Broadcasting Income: FY 1982 (Preliminary)* (July 1983) (CPB expenditures accounted for 20.5% of noncommercial broadcasting's FY 1982 income; private sources supplied 40.9%). Moreover, only about half of CPB's contribution goes directly to noncommercial stations. See CPB, *Annual Report 1981*, at 7-8 (only \$96.1 million of CPB's 1981 appropriation of \$162 million was distributed in operating grants to stations). Some stations, like KSJN-AM in St. Paul, Minnesota, receive as little as \$2,560 per year from CPB. *Id.* at 42.

The Government repeatedly attempts to overstate the federal contribution by misleadingly merging all federal, state, and local tax-based assistance into a single "government" category and citing only to those combined data. See generally Brief of *Amici Curiae* PBS and NAB, at 11-15.

³⁷See 47 C.F.R. § 73.621. It bears repeating that none of these 1400 stations is owned or operated by the federal government. The majority of CPB recipients are private, community-based educational corporations. Most of the others are licensed either to private colleges and universities or to publicly supported educational institutions. See CPB, *1982 Public Broadcasting Directory*, at 18-50, 66-68 (in 1981, 319 (82%) of the 388 licensees receiving CPB grants were operated by private nonprofit educational foundations or institutions of higher learning). Even if the publicly supported stations could be considered "government-owned," despite their being operated by independent boards and commissions, there is no basis for attributing the local and state involvement to the federal government, as the Government's brief attempts to do.

municative activities in this country. Virtually every medium is infused with some form of direct or indirect support: Newspapers and periodicals receive substantial postal subsidies (*see Buckley v. Valeo*, 424 U.S. 1, 93 n.127 (1976)); commercial broadcasters receive the value of their license (*see Community-Service Broadcasting, supra*, 593 F.2d at 1120 n.43); all media receive significant subsidies in tax benefits and sizeable revenues from government advertising.³⁸ Congress today funds everything from education to elections, from parks to playhouses. If the existence of such support were deemed sufficient to justify restricting the recipients' freedom of speech, the First Amendment would soon become meaningless.³⁹

³⁸*See CBS v. DNC, supra*, 412 U.S. at 174 n.5 (Brennan, J., dissenting) (license represents government subsidization of broadcasting); *Gottfried v. FCC*, 655 F.2d 297, 312 & n.55 (D.C. Cir. 1981) (license is "a commodity of great value"), *rev'd on other grounds sub nom. Community Television of Southern California v. Gottfried*, 103 S.Ct. 885 (1983). *See generally* Shiffrin, *Government Speech*, 27 U.C.L.A. L. Rev. 565, 624 n.279 (1980): "The limited funds granted to public broadcasting stations are paltry compared to the economic value of the spectrum given to many if not most commercial broadcasters." For example, a VHF station license recently sold for \$220 million. *See* Govt. Brief 29 n.59. In contrast, the entire CPB appropriation for the preceding year was only \$162 million. CPB, *Annual Report 1981*, at 4. The value of the federal postal subsidy is likewise enormous. *See Hannegan v. Esquire*, 327 U.S. 146, 151 n.7 (1946) (subsidy to *Esquire Magazine* estimated to be \$500,000 a year in 1946). And the amount of federal money disbursed to the media through government advertising totalled over \$189 million in 1981, almost twice the sum distributed directly to noncommercial stations by CPB. *Advertising Age*, Sept. 9, 1982, at 177.

³⁹To take but one example of the far-reaching implications of appellant's argument, the Government specifically analogizes support for noncommercial broadcasting to that provided to many schools and universities, contending that for both enterprises, involvement in "partisan ideological controversies" would endanger the success of their mission. Govt. Brief 34-35. The Government obviously believes, therefore — and it follows from the illogic of its argument — that it could impose a restriction similar to § 399 on any university that received federal assistance (as virtually all do), prohibiting that school from expressing its institutional views on public issues. As a result, such institutions would be barred from offering their respected opinions to this Court as *amici curiae* in cases involving important (footnote continued on following page)

Courts have therefore rejected any argument that government subsidization of expression provides a legitimate rationale for interfering with its content. For example, government efforts to limit the editorial discretion of state-subsidized publications have uniformly been rebuffed on First Amendment grounds.⁴⁰ This Court, too, has repeatedly held that even though the government may not have been obligated to create or support a forum for communication in the first instance, once it has chosen to do so, any restrictions imposed must conform to traditional First Amendment standards. *E.g.*, *Widmar v. Vincent*, 454 U.S. 263, 267 (1981); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555-58 (1975).⁴¹

issues, even those that might uniquely affect the schools themselves. *Cf.*, *e.g.*, *Bakke v. Regents of California*, 438 U.S. 265, 316-17 (1978) (opinion of Powell, J.) (referring with approval to minority recruitment program implemented by Harvard College and described in its *amicus curiae* brief).

It is ironic that *amicus curiae* Mobil Corporation argues that noncommercial broadcasters should not have the right to use tax dollars to express their views on public issues. The oil industry, of course, is one of the most heavily subsidized in this country; the oil depletion allowance alone has an estimated value of \$3 billion in FY 1984. OMB, *Budget of the U.S. Government, FY 1984*, at 5-38. Yet as its participation in this case demonstrates, and as anyone who reads the local newspapers is aware, Mobil freely propagates its "private" views with the support of these taxpayer funds.

⁴⁰*See, e.g.*, *Gambino v. Fairfax County School Bd.*, 564 F.2d 157 (4th Cir. 1977), *aff'd per curiam*, 429 F.Supp. 731 (E.D. Va. 1978); *Schiff v. Williams*, 519 F.2d 257, 260-61 (5th Cir. 1975); *Bazaar v. Fortune*, 476 F.2d 570, 574 (5th Cir.), *aff'd as modified en banc*, 489 F.2d 225 (5th Cir. 1973), *cert. denied*, 416 U.S. 995 (1974); *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973). The prohibition against content interference exists even where, unlike here, the government wholly funds an activity. *See, e.g.*, *Antonelli v. Hammond*, 308 F.Supp. 1329, 1337 (D. Mass. 1970).

⁴¹As the Court of Appeals for the D.C. Circuit concluded in rejecting the very contention made by the Government in this case:

[N]oncommercial licensees are fully protected by the First Amendment. Clearly, the existence of public support does not render the licensees vulnerable to interference by the federal government without regard to or restraint by the First Amendment.

Community-Service Broadcasting, supra, 593 F.2d at 1110.

Thus, there is no legitimate government interest in prohibiting noncommercial broadcasters from expressing their "private" views in order to preserve the medium for its intended "mission." In fact, as discussed above, the licensee's expression of its "private" editorial opinions is perfectly compatible with its intended societal function. Nor is there any legitimacy to the assertion that subsidizing the noncommercial licensee's editorial speech could lead to constitutional problems.⁴² As this Court held in *Buckley v. Valeo*, *supra*, when financial assistance is provided not to abridge, but to facilitate the exercise of free speech, the funding of private political views does not violate the First Amendment rights of taxpayers who might disagree with those views. See 424 U.S. at 90-93. Indeed, *Buckley* specifically adverted to the subsidization of noncommercial broadcasting as an example of an attempt to enhance First Amendment values by promoting "a society in which 'uninhibited, robust, and wide-open' public debate concerning matters of public interest would thrive." *Id.* at 93 n.127 (citation omitted).⁴³

⁴²Since § 399 prohibits noncommercial stations from editorializing even with nongovernmental funds, the Government's attempt to justify the statute as necessary to guard against the use of public funds to pay for the licensee's expression of its "private" views can readily be dismissed. See also pp. 45-47, *infra*. More fundamentally, *all* views expressed on broadcast stations are "private." A licensee can do nothing but air an aggregate of "private" voices, and if taxpayers' dollars help fund the broadcasting entity, they inevitably aid in the expression of those "private" views. The voice of the licensee itself, then, is but one of many such voices, and there is no justification under this rationale for singling it out for exclusion.

⁴³The Government's reliance on *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), is misplaced, for that case held only that an individual could not be required "to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher." *Id.* at 235. It is quite different to assert that the government may not support an endeavor with which some taxpayers may disagree. As this Court noted in *Buckley v. Valeo*, *supra*, every Congressional appropriation uses public money in a manner to which some taxpayers object. 424 U.S. at 90-92. Furthermore, it is a giant leap from the remedy applied in *Abood*, which did not infringe on anyone's right of free expression, to § 399's suppression of the broadcaster's editorial opinions. See *Bellotti*, *supra*, 435 U.S. at 794 n.34.

2. In addition, there is no basis for believing that if noncommercial stations were permitted to editorialize, they would be used for the propagation of "partisan ideological ends." Noncommercial broadcasters had been on the air for nearly fifty years before § 399 was enacted, without a single recorded instance of a station being "captured" by private, ideological interests. For at least forty of those years, noncommercial broadcasters had been allowed to editorialize, and since 1962, they had been receiving federal funds while doing so — all without any hint of a station's exploitation for partisan ends. And there was no reason to think that an increase in federal aid to noncommercial broadcasting would somehow suddenly change things. In short, the alleged fear that permitting noncommercial broadcasters to express their "private" opinions would lead to the propagation of "partisan ideological ends" is simply made out of whole cloth. *Cf. Bellotti, supra*, 435 U.S. at 789 ("If appellee's arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, . . . these arguments would merit our consideration. . . . But there has been no [such] showing") (citation omitted).⁴⁴

Further, even were it inclined to do so, a noncommercial broadcaster could not use its station to propagate its own narrow viewpoint. The Government conveniently ignores any mention of the

⁴⁴Ironically, noncommercial licensees are uniquely accountable to public, rather than private, interests, and are the least likely to be "captured" by narrow, private-interest groups. Not only must they serve the "public interest, convenience, and necessity" as a condition of obtaining and retaining their license (47 U.S.C. § 309), but they must satisfy additional requirements designed to promote public accountability. For example, noncommercial stations not affiliated with governmental entities must establish and consult with "community advisory boards" that review their programming policies to ensure that the diverse needs and interests of the community are being represented. 47 U.S.C. § 396(k)(9). Moreover, unlike commercial broadcasters, noncommercial licensees are by the very nature of their ownership ultimately responsible to some entity that represents the public. And because noncommercial broadcasters depend so heavily upon the public for financial assistance and volunteer services, they are not likely to alienate that public support by using the stations to pursue their own ideological ends.

fairness doctrine, which — applicable to commercial and noncommercial stations alike (see *Accuracy in Media, Inc. v. FCC*, 521 F.2d 288, 295 (D.C. Cir. 1975)) — mandates a balanced and fair presentation of all controversial issues, thereby ensuring that the broadcaster cannot present only one side of any issue. See *Red Lion*, *supra*, 395 U.S. at 379-86; *Editorializing Report*, *supra*, 13 F.C.C. at 1252-53.⁴⁵ Thus, the fear of noncommercial broadcasting stations being used for the propagation of the partisan ideological ends of its management is entirely speculative, and § 399's prohibition against editorializing cannot be justified under this rationale. See *McDaniel v. Paty*, 435 U.S. 618, 628 (1978).

- b. *The Alleged Interest in Preventing CPB-Funded Stations From Becoming Government Propaganda Organs Is Far From Compelling.*

The second interest asserted by the Government is that § 399 is necessary to prevent noncommercial broadcasting from becoming a vehicle for the dissemination of government propaganda. If CPB-funded stations were permitted to editorialize, the argument goes, it would be impossible to prevent political considerations from influencing the distribution of federal aid, and the broadcasters would inevitably air editorials favorable to those who hold the purse strings. Govt. Brief 35-39. As the District Court concluded (J.S. App. 12a-15a), however, this purported justification is also entirely speculative and unfounded. See *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967); *Williams v. Rhodes*, 393 U.S. 23 (1968).

Certainly nothing in the record before Congress gave anyone reason to fear that noncommercial broadcasters would suddenly become subject to government control simply because they were now to receive more federal assistance. As the sponsor of § 399 admitted, the government had been funding noncommercial stations for several years and there had been no hint of either favoritism in the distribution of those grants or interference with the broadcaster's

⁴⁵The Government also fails to mention that the "other" provision of § 399, which is not being challenged in this case, prevents the noncommercial broadcaster from injecting itself into partisan controversies and elections.

programming. 113 Cong. Rec. 26407 (remarks of Rep. Springer). If anything, the additional safeguards built into the Public Broadcasting Act made the possibility of government manipulation even more remote, for under its elaborate dual-level funding system, there is simply no way that a station's editorial policies can affect either its eligibility for, or the amount of, a CPB grant; a station would receive the exact same grant whether it praised or criticized the "government" in its editorials.

Any assertion that noncommercial broadcasting would respond to government pressure by biasing its editorials and converting itself into "a giant, government-controlled propaganda machine" must likewise be dismissed as "necessarily wholly speculative." *Buckley v. Valeo*, *supra*, 424 U.S. at 93 n.126 (rejecting contention that political parties receiving federal funds would be susceptible to government influence). There is surely no historical support for the Government's argument; there have never been any charges that noncommercial broadcasting has adopted a "pro-government" slant to its programming (see M. Yudof, *When Government Speaks* 124-35 (1983)), and the diverse and pluralistic nature of noncommercial broadcasters makes it virtually inconceivable that they would speak with one voice on any issue, much less with the voice of the federal government. *Id.* at 129-30. See generally Brief of Amici Curiae PBS and NAPTS at 19-21. Cf. *Bellotti*, *supra*, 435 U.S. at 785 n.22 ("We know of no documentation of the notion that corporations are likely to share a monolithic view on an issue such as the adoption of a graduated personal income tax.")⁴⁶

⁴⁶The Government argues for the first time on this appeal — and without any support in the legislative history — that § 399 was also prompted by congressional concern over possible interference by state and local governments in the programming of their affiliated licensees. Even if this were a concern, it could not justify restricting the speech of the over 200 CPB-funded stations, including appellee Pacifica, that are privately owned and operated, with no connection to governmental entities. Moreover, there is no reason why the editorializing ban should be tied to the presence of CPB funding if the perceived danger is the potential for manipulation by state and local governments.

In addition, the suggestion that the *federal* government can silence the voice of a state- or local-affiliated broadcaster under this rationale is very

Moreover, the alleged fear that a station would attempt to curry favor with the government by biasing its editorial opinions makes no intuitive sense. For who is the "government"? And what is the "pro-government" position? Is it the Administration's? the Senate's? the FCC's? These different governmental actors and entities will often disagree — indeed that disagreement is almost by definition what identifies an issue as appropriate for editorial comment — leaving the broadcaster who wants to please the "government" with no clear choice. The safest option for the broadcaster seeking to curry favor, then, is simply not to editorialize at all, so as not to offend anyone.

Finally, as the District Court noted, there is another safeguard that demonstrates the utter fallacy of the Government's argument. The fairness doctrine and its specific manifestations in the personal attack and political editorializing rules require the licensee to provide a fair and balanced presentation of differing viewpoints, without regard to its own particular opinions. Thus even if the station presents a "pro-government" editorial, the opposing viewpoint will be heard, as well. In sum, the District Court was manifestly correct in concluding that the hypothetical fear of noncommercial broadcasting stations becoming government propaganda organs was entirely too speculative to justify § 399's prohibition against editorializing.⁴⁷

troubling. Surely, state and local governments retain the right to communicate their opinions on important public issues. A state "may seek to disseminate information so as to enable its citizens to make better informed decisions." *Bigelow v. Virginia*, 421 U.S. 809, 824 (1975). As long as the government does not monopolize the airwaves, there is no constitutional justification for prohibiting the expression of its views. See T. Emerson, *The System of Freedom of Expression* 651 (1970); Canby, *The First Amendment and the State as Editor: Implications for Public Broadcasting*, 52 Texas L. Rev. 1123, 1127 (1974). Particularly where the local governmental entity may wish to express its opposition to the policies of the federal government, serious federalism concerns are raised by the latter's suppression of the former's right to editorialize. See, e.g., *EEOC v. Wyoming*, 103 S.Ct. 1054, 1060-61 (1983).

⁴⁷The Government suggests that the District Court erred in not deferring to Congress' judgment in this regard. However, where fundamental free speech and press rights are infringed, courts have always conducted their own exacting scrutiny of the asserted justifications and have imposed a

(footnote continued on following page)

C. Section 399's Ban on Editorializing Is an Irrational and Impermissible Response to Its Purported Objectives.

Even if there were some reason to fear that CPB-funded non-commercial stations would propagate their own private views or those of the "government" — and even if there were some legitimate government interest in preventing those views from being expressed⁴⁸ — § 399 still could not survive even the most minimal First Amendment scrutiny, for there is "no substantially relevant correlation between the governmental interest asserted and the [Government's] effort' to prohibit appell[ees] from speaking." *Bellotti, supra*, 435 U.S. at 795 (quoting *Shelton v. Tucker*, 364 U.S. 479, 485 (1960)). If the prohibition on editorializing is truly aimed at preventing the propagation of "private, partisan" viewpoints or preventing noncommercial stations from becoming propaganda organs, § 399 is not even rationally related to that end, much less is it "a precisely drawn means" of achieving that objective. *Consolidated Edison Co. v. Public Service Comm'n, supra*, 447 U.S. at 540.

1. On the one hand, § 399 broadly prohibits editorializing on all issues, not just those expressing partisan or "pro-government"

heavy burden on the government to demonstrate the substantiality and immediacy of the alleged harm. *Cf. New York Times Co. v. United States*, 403 U.S. 713, 730 (Stewart, J., concurring); *id.* at 732 (White, J., concurring). As this Court has admonished:

Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake. . . . Were it otherwise, the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified.

Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843-44 (1978). *Accord, Metromedia, Inc. v. City of San Diego, supra*, 453 U.S. at 519.

⁴⁸Even if the Government were correct that Congress had enacted § 399 to ensure that stations not air "pro-government" editorials, the editorializing prohibition would be no less illegitimate. Congress would still be suppressing speech based on the speaker's viewpoint. Congress cannot constitutionally bar stations from expressing their sincerely held beliefs that the policies of the "government" are appropriate any more than it could prohibit them from expressing "anti-government" sentiments.

opinions.⁴⁹ The statute thus prevents the noncommercial broadcaster from contributing to the public debate on the numerous issues of interest to its community that neither have a partisan component nor bear any relation to the federal government. For example, what is the partisan perspective on child abuse? Is advocating a crackdown on uninsured drivers a "pro-government" or "anti-government" issue? The subjects that are of the greatest concern to the communities served by local stations are for the most part themselves purely local, cutting across partisan lines and having little connection to the federal government.⁵⁰ Section 399 thus impermissibly sweeps within its ambit clearly protected speech that poses no danger to the purported government interests. "Broad prophylactic rules in the area of free expression are suspect. . . . Precision of regulation must

⁴⁹The overbreadth of § 399 is but one way in which this statute differs from the Hatch Act's limitation on the political activities of federal employees, and any attempt to draw support for § 399 by analogy to that statute is misplaced. See 5 U.S.C. §§ 7324 *et seq.*; *Civil Service Comm'n v. National Assoc. of Letter Carriers*, 413 U.S. 548 (1973). Whereas § 399 broadly suppresses all editorial expression, the Hatch Act narrowly proscribes only "plainly identifiable acts of political management and political campaigning" (*id.* at 567), explicitly preserving the employee's right "to express his opinion on political subjects and candidates." *Id.* at 576. See 5 U.S.C. § 7324(b). In addition, the Hatch Act only covers government employees; noncommercial stations are independent entities. Finally, in upholding the Hatch Act, the Court emphasized that Congress imposed those restrictions only after more than a century of experience and experimentation with less restrictive alternatives had conclusively demonstrated that they were needed to maintain the effective operation of government and to preserve the sanctity of the electoral process. 413 U.S. at 564. In contrast, no such compelling interests or historical experience justify § 399's suppression of protected speech.

⁵⁰A compilation of topics addressed in the editorials and replies appearing on television station KNXT in Los Angeles during a random four-week period in August, 1983 is set out in Appendix B. Only one of the eighteen editorials had any relation to the federal government (and it certainly was not "pro-government"), and it would be difficult to identify a partisan interest in many of the issues that were discussed. This finding is corroborated by research surveying nationwide editorial practices. See, e.g., Fang & Whelan, *Survey of Television Editorials and Ombudsman Segments*, 17 J. Broadcasting 363 (1973).

be the touchstone." *NAACP v. Button*, 371 U.S. 415, 438 (1963).

On the other hand, if § 399 was really intended to prevent non-commercial stations from propagandizing on behalf of their own or the "government's" viewpoint, it "provides only ineffective or remote support for the government's purpose." *Central Hudson Gas v. Public Service Comm'n*, 447 U.S. 557, 564 (1980). For example, § 399 outlaws only the licensee's *editorial* speech and imposes no restrictions on any other aspect of the broadcaster's public affairs programming. Yet, as the FCC acknowledged over thirty years ago in specifically rejecting the very argument now being proffered by the Government in its name, the broadcaster that is determined to propagate a particular viewpoint can readily do so through myriad other programming formats.⁵¹ As Congress was well aware when it enacted § 399, these formats could much more easily be abused to advocate subtly a particular editorial position.⁵² Editorials, in fact, would be the least effective vehicle for propagandizing: An editorial is the most forthright expression of a station's position; it must be clearly labelled as such; and it triggers most directly the obligation to present contrasting viewpoints under the fairness doctrine. Indeed, the FCC has held that expression of the licensee's opinion may "be actually helpful in providing and maintaining a climate of fairness and equal opportunity for the expression of contrary views. Certainly the public has less to fear from the open partisan than from the

⁵¹ It is clear that the licensee's authority to determine the specific programs to be broadcast over his station gives him an opportunity . . . to insure that his personal viewpoint on any particular issue is presented in his station's broadcasts, whether or not these views are expressly identified with the licensee.

Editorializing Report, *supra*, 13 F.C.C. at 1252. In fact, it was in part the recognition of this very point that led the FCC to reject a prohibition against editorializing and to adopt the fairness doctrine as the means of ensuring the balanced presentation of differing viewpoints on public issues. *Id.* at 1252-53.

⁵² In the House debate, for example, Rep. Watson explained:

Let them go ahead and editorialize. Give me the right to control program content, and others can editorialize all they want to, but I will influence the thinking of the American public more with the programs or with people I have appearing on the programs.

113 Cong. Rec. 26392. *Accord, id.* at 26408-09 (remarks of Rep. Brown).

covert propagandist." *Editorializing Report*, *supra*, 13 F.C.C. at 1254; *accord*, 1983 *Proposed Rulemaking* 17-18.

Moreover, the fact that § 399 has been interpreted to prohibit "only" the views of "licensees, their management or those speaking on their behalf" (*see In re Complaint of Accuracy in Media, Inc.*, 45 F.C.C.2d 297, 302 (1973))⁵³ merely highlights the irrationality of the statute, for it means that *the very same opinions* that cannot be expressed by the licensee could be broadcast if they were mouthed by a station commentator, by a guest being interviewed, or by a person who simply walks in off the street. In fact, since the licensee retains the discretion to select whomever it wishes to speak on its station, the ban on licensee editorializing accomplishes nothing at all — except to suppress the one voice that most rightfully should be heard. *Cf. Buckley v. Valeo*, *supra*, 424 U.S. at 45 (limiting interpretation of statute only undermines its effectiveness); *Bellotti*, *supra*, 435 U.S. at 793 (prohibition's underinclusiveness undermines plausibility of state's purported interest); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 110 (1977) (Rehnquist, J., concurring) (statute's failure largely to achieve its purpose makes it difficult to

⁵³The Government argues that this limiting interpretation means that § 399 "interferes only minimally" with freedom of speech, because it does not prevent a licensee from expressing its views in any other medium and because others are free to state their opinions on the station's facilities. But it has long been settled that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State*, 308 U.S. 147, 163 (1939). *Accord*, *Spence v. Washington*, 418 U.S. 405, 411 & n.4 (1974). And as Justice Blackmun cogently observed last Term, "It hardly answers one person's objection to a restriction on his speech that another person, outside his control, may speak for him." *Regan v. Taxation With Representation*, 103 S.Ct. 1997, 2005 (1983) (Blackmun, J., concurring). More important, the First Amendment prohibits the minor, as well as the major, abridgment of its precious freedoms. *Thomas v. Collins*, 323 U.S. 516, 543 (1945) ("The restraint is not small when it is considered what was restrained."); *Near v. Minnesota*, 283 U.S. 697, 721 (1931); *N.L.R.B. v. Fruit and Veg. Packers and Warehousemen*, 377 U.S. 58, 80 (1964) (Black, J., concurring) ("First Amendment freedoms can no more validly be taken away by degrees than by one fell swoop.").

take asserted state interest seriously).⁵⁴

Likewise, § 399 restricts only the CPB-funded noncommercial broadcaster, even though the opportunity for government interference is just as great, if not greater, with respect to any of the other communicative activities subsidized by the federal government. Even in the broadcast medium, CPB funding is not the touchstone by which the potential for government control should be measured. For example, the threat of license nonrenewal (which hangs over commercial and noncommercial stations alike) and the host of subtle, yet powerful, "raised eyebrow" regulation practices, would provide a much stronger, less visible — and hence more dangerous — wedge for exerting leverage over editorial content than does the often minimal amount of direct CPB assistance.⁵⁵

In short, the Government's argument proves too much and its statute addresses too little. Even if there were some basis for the Government's purported fears, § 399's ban on editorializing by non-commercial licensees "does not provide an answer that sufficiently relates to the elimination of those dangers." *Buckley v. Valeo*, *supra*, 424 U.S. at 45; *accord*, *Carey v. Brown*, *supra*, 447 U.S. at 465 (apparent overinclusiveness and underinclusiveness of restriction undermines asserted state interest). Indeed, this Court's statement in *Bellotti*, *supra*, 435 U.S. at 793, is just as applicable here: "The fact that a particular kind of ballot question has been singled out for special treatment undermines the likelihood of a

⁵⁴The perversity of § 399 is that under the guise of preventing the propagation of "private" viewpoints, the one entity that is most responsive and responsible to the "public interest" is the only entity that cannot express its opinions over the noncommercial station. Nor can the selective exclusion of the licensee's viewpoint be justified on the ground that its opinion might prove more persuasive than others aired over its facilities. See *Bellotti*, *supra*, 435 U.S. at 790-91 ("the fact that advocacy may persuade the electorate is hardly a reason to suppress it").

⁵⁵See, e.g., *Community-Service Broadcasting*, *supra*, 593 F.2d at 1115-16; *Writers Guild v. FCC*, 423 F.Supp. 1064, 1146 (C.D. Cal. 1976), *vacated on jurisdictional grounds*, 609 F.2d 355 (9th Cir. 1976). Because commercial broadcasters have much greater market shares, the government would also have more incentive to influence their programming than that of the less popular noncommercial stations. See M. Yudof, *When Government Speaks*, *supra*, at 125-26.

genuine state interest in protecting shareholders. It suggests instead that the legislature may have been concerned with silencing corporations on a particular subject."

2. Finally, § 399's means of addressing the purported fears of broadcaster partisanship and government propagandizing is fundamentally at odds with the First Amendment. The statute suppresses the licensee's views in advance of their expression, allegedly in order to eliminate any possibility that the "privilege" of broadcasting might be abused. But the First Amendment does not permit the Government to restrain speech out of fear of its potential adverse consequences. *See generally Near v. Minnesota*, 283 U.S. 697 (1931). If ever a noncommercial broadcasting station were to ignore its fairness doctrine obligations and use its facility to propagate a particular partisan or "pro-government" viewpoint, then that would be the time to take remedial action, including, if necessary, revocation of its license. The Government may not, however, prohibit the broadcaster from speaking merely in *anticipation* of any such remote occurrence. "It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 770 (1976); *Bellotti, supra*, 435 U.S. at 791-92.

In particular, to permit the government to silence the broadcaster in order to prevent the hypothetical possibility of government interference stands the First Amendment on its head. That Amendment is premised on the principle that freedom of speech and a free press are the most valuable defenses against government excesses; government suppression of speech is precisely the evil to be feared, not the remedy to be applied. "Any other accommodation — any other system that would supplant private control of the press with the heavy hand of government intrusion — would make the government the censor of what the people may read and know." *Miami Herald Publishing Co. v. Tornillo, supra*, 418 U.S. at 260 (White, J., concurring). *Accord, CBS v. DNC, supra*, 412 U.S. at 124-25.

Thus, the constitutionally permissible response to any fear that the government's or the licensee's views might dominate the airwaves is not to close down the broadcaster's editorial room, but, as the fairness doctrine already requires, "to push the doors open

to all viewpoints." *Community-Service Broadcasting*, *supra*, 593 F.2d at 1134 n.62 (Robinson, J., concurring). More speech, not less speech, is the way of the First Amendment. *See, e.g., Bellotti*, *supra*, 435 U.S. at 790-91; *Red Lion*, *supra*, 395 U.S. at 390; *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring). If existing measures are deemed insufficient, the answer lies in tightening the safeguards against government interference and vigilantly enforcing the fairness doctrine, not in suppressing the broadcasters' views. "Freedom of the press cannot be preserved, as Mr. Justice Frankfurter noted, by prohibitions calculated 'to burn the house to roast the pig.' *Butler v. Michigan*, 352 U.S. 380, 383 (1957)." *Joyner v. Whiting*, 477 F.2d 456, 462 (4th Cir. 1973). As the appellant FCC itself concluded in rejecting a call for a prohibition on licensee editorializing:

Assurance of fairness must in the final analysis be achieved, not by the exclusion of particular views because of the source of the views, or the forcefulness with which the view is expressed, but by making the microphone available, for the presentation of contrary views without deliberate restrictions designed to impede equally forceful presentation.

Editorializing Report, *supra*, 13 F.C.C. at 1253-54.

II. SECTION 399'S DISCRIMINATORY SUPPRESSION OF THE CPB-FUNDED BROADCASTER'S EDITORIAL OPINIONS VIOLATES THE EQUAL PROTECTION GUARANTEES OF THE FIRST AND FIFTH AMENDMENTS.

Because § 399 discriminates with respect to the speech it permits in the same medium of expression, the Equal Protection component of the First and Fifth Amendments "mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized." *Carey v. Brown*, *supra*, 447 U.S. at 461-62; *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 98-99, 101 (1972). In particular, when the Government selectively prohibits one category of speech or class of speaker, it bears a heavy burden of justifying those exclusions. "In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue." *Bellotti*, *supra*, 435 U.S. at 784-85.

Section 399 violates this fundamental principle of equality. The statute applies to only one type of broadcasting station; it restricts the free expression of only one speaker on that station; and it prohibits speech in only one form and on only one subject. Yet none of these discriminations can be shown to be even reasonably related to the purported government interests behind the ban on editorializing.

For example, communications media that receive federal subsidies other than CPB grants are permitted to editorialize, even though they are no less susceptible to government influence and no less likely to espouse "private" viewpoints. See *Community-Service Broadcasting v. FCC*, *supra*, 593 F.2d at 1123 n.52. Noncommercial stations that receive no CPB monies often receive discretionary funding from diverse federal entities such as the National Endowment for the Arts or the Departments of Commerce and Education;⁵⁶ commercial broadcasters receive federal subsidies in other forms, including their valuable license at no cost; the print media are likewise heavily subsidized through reduced postal rates and tax exemptions; more generally, the federal government subsidizes individuals and organizations ranging from universities to oil companies; yet only the CPB-funded broadcasters (whose grants pass through an elaborate mechanism precisely to ensure their insulation from government interference) are prohibited from expressing their own views.

Section 399's restraint of speech is even less defensible when the exact scope of the restriction is examined, for it prohibits only editorials presented on behalf of the station management. Opinions may be voiced by anyone else, even though such persons are no less likely to express "private" viewpoints or to espouse "pro-government" positions, particularly since the licensee retains the authority to decide whom to let on the air. Similarly, the statute bans only editorials and does not address the multitude of other

⁵⁶See CPB, *Inventory of Federal Funds Distributed to Public Telecommunications Entities*, FY 1981 (June 1983) (\$32 million distributed directly to noncommercial licensees through twenty different federal programs). Much of this money — such as NTIA's new facilities' construction grants — went to stations that did not receive CPB grants. See *Community-Service Broadcasting v. FCC*, *supra*, 593 F.2d at 1120 & n.42; *Carnegie II*, at 122.

programming formats, such as news commentary, interviews, and documentaries, that would be at least as attractive as vehicles for propagandizing or propagating partisan views. As the FCC itself has explained, the licensee editorials prohibited by § 399 are "just one of several types of presentation of public issues" and are not "intrinsically more or less subject to abuse than any other program devoted to public issues." *Editorializing Report*, *supra*, 13 F.C.C. at 1253.

Moreover, § 399 bars *all* editorial expression by *all* CPB-funded stations, including those editorials concerning purely local or non-governmental issues for which it would be impossible even to identify a partisan or federal interest. The denial of First Amendment rights cannot be founded upon the presumption of partiality and vulnerability to government influence that underlies § 399. See *Police Dept. of Chicago v. Mosley*, *supra*, 408 U.S. at 100-01 (selective prohibition of nonlabor picketing held unconstitutional because government may not distinguish among speakers and subject matters "on such a wholesale and categorical basis"); *McDaniel v. Pate*, *supra*, 435 U.S. at 645 (White, J., concurring).

In sum, § 399 lacks the precision of regulation mandated by the First Amendment and the Equal Protection Clause. In only one selective context — that of overt editorializing by CPB-funded non-commercial broadcasters — is the existence of a partial federal subsidy deemed to necessitate the abridgment of freedom of speech and the press. And within that context, no effort is made at individualized inquiry, with the result that speech posing absolutely no danger to the asserted government interests is subject to § 399's overbroad prohibitions. Under the Equal Protection guarantee, then, § 399 cannot stand.

III. SECTION 399 UNCONSTITUTIONALLY CONDITIONS THE RECEIPT OF A CPB GRANT ON THE BROADCASTER'S FORFEITURE OF ITS FIRST AMENDMENT RIGHTS.

Section 399 also violates the principle that the government may not condition the receipt of a public benefit on the relinquishment of constitutional rights. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Speiser v. Randall*, 357 U.S. 513, 518 (1958); *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 593-94 (1926). While the government may be under no obligation to provide a benefit in the first place, "[i]t is too late in the day to doubt that

the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.” *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). Because § 399 requires the noncommercial licensee to forfeit its right to editorialize with its own funds in order to receive a CPB grant, “[o]nly the gravest abuses, endangering paramount interests,” can justify the statute’s infringement upon the station’s exercise of its First Amendment liberties. *Id.* at 406 (quoting *Thomas v. Collins*, *supra*, 323 U.S. at 530).

That § 399 places a condition on the receipt of a CPB grant cannot be denied. All commercial broadcasters, and all noncommercial broadcasters that do not receive grants from CPB, are free to speak out on issues of public importance. But in distributing financial aid to noncommercial stations through CPB grants, the Government has placed the noncommercial broadcaster in the position of having to choose between retaining its right to editorialize (as it did before § 399 was enacted) or receiving federal aid; it cannot do both. “In reality, the [grantee] is given no choice, except a choice between the rock and the whirlpool, — an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden.” *Frost & Frost Trucking Co. v. Railroad Comm’n*, *supra*, 271 U.S. at 593.⁵⁷

This Court has repeatedly condemned any such governmental attempt to use the power of its purse to “produce a result which [it] could not command directly.” *Speiser v. Randall*, *supra*, 357 U.S. at 526. For example, in *Sherbert v. Verner*, *supra*, the Court invalidated an unemployment insurance law that required recipients to work in violation of their religious convictions, holding that the

⁵⁷The alarming implications of such a coercive use of governmental largesse in subsidizing the communications media were recognized in *Han-negan v. Esquire*, *supra*, 327 U.S. at 155-56 (citations omitted):

We may assume that Congress . . . need not open second-class mail to publications of all types. . . . But grave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever. . . . Under that view the second-class rate could be granted on condition that certain economic or political ideas not be disseminated.

State could not force an applicant "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." 374 U.S. at 404. *Accord*, *Speiser v. Randall*, *supra* (tax exemption conditioned on signing loyalty oath); *McDaniel v. Paty*, *supra* (holding of public office conditioned on surrendering ministry).⁵⁸ Here, too, the noncommercial broadcaster must abandon a central element of its First Amendment rights in order to receive the governmental benefit.

The Government relies upon the recent decision in *Regan v. Taxation With Representation*, 103 S.Ct. 1997 (1983) ("TWR"), to claim that § 399 does not abridge the noncommercial broadcasters' free speech, but merely provides that the federal government will not subsidize their editorials. Far from supporting the Government's contention, however, *TWR* only confirms the constitutional defects of § 399.

In upholding a limitation on "substantial" lobbying by tax-exempt organizations, the Court in *TWR* specifically noted that under the dual provisions of § 501(c)(3) and § 501(c)(4) of the Internal Revenue Code, any organization could segregate its lobbying activities from its nonlobbying activities by establishing two parallel operations (one under each of the two Code provisions), and by

⁵⁸*McDaniel v. Paty*, *supra*, is particularly apposite, for the State argued there that its prohibition on clergy holding public office was necessary to protect against the possibility that clergymen would unduly promote their sectarian interests. Finding no persuasive support for the fear that clergymen would be unfaithful to their public duties, this Court rejected the asserted rationale and held that the clergy-disqualification provision unconstitutionally conditioned the right to seek office on surrender of the right to be a minister. As Justice Brennan stated in concurrence:

[G]overnment may not as a goal promote "safe thinking" with respect to religion and fence out from political participation those, such as ministers, whom it regards as overinvolved with religion. . . . The antidote which the Constitution provides against zealots who would inject sectarianism into the political process is to subject their ideas to refutation in the marketplace of ideas.

435 U.S. at 641-42. Similarly, the antidote which the Constitution provides against broadcast licensees who may espouse "private" or "pro-government" viewpoints is to subject their ideas to refutation in the marketplace.

doing so, could both lobby and receive the full benefits of tax deductibility for its nonlobbying activities. In other words, the Court explained, Congress had not forced the organization to forfeit its right to lobby in order to qualify as tax-exempt, but had merely chosen not to pay for its lobbying activities out of public monies.⁵⁹ As the three concurring Justices pointed out, the availability of the § 501(c)(4) affiliate option is critical to the decision in *TWR*, for it enables the charitable organization simultaneously both to lobby and to receive the government subsidy to which it is entitled for its nonlobbying activities. *Id.* at 2004-05 (Blackmun, J., concurring). No such option exists for the noncommercial broadcaster under § 399.

Section 399 simply does not fit the mold of *TWR*, since it does not merely provide that Congress will not pay for the noncommercial broadcasters' editorializing, but instead prohibits them from editorializing even with their own private funds. *Cf. id.* at 2001 n.7 (distinguishing *CARC v. Berkeley*, *supra*, because the ordinance invalidated in that case had unconstitutionally limited individuals' expenditure of *their own money* on political speech). In contrast to the Internal Revenue Code, § 399 does not permit a noncommercial station to editorialize with its own funds while still receiving government subsidies to support its non-editorializing activities.⁶⁰

⁵⁹The Court analogized the situation in *TWR* to that in *Harris v. McRae*, 448 U.S. 297, 317 n.19 (1980), where it had explained that the government's refusal to provide Medicaid benefits to fund abortions was permissible, but an attempt to withhold *all* Medicaid benefits from an otherwise eligible candidate simply because she had exercised her right to have an abortion would be impermissible. *See* 103 S.Ct. at 2003; *id.* at 2004 n.* (Blackmun, J., concurring). Section 399 does precisely what the Court in *Harris v. McRae* said would be unconstitutional: It would withhold all CPB grants from an otherwise eligible station simply because that station wished to exercise its right to editorialize.

⁶⁰In fact, the instant case presents just the situation that the concurring Justices emphasized would be unconstitutional under *Speiser v. Randall*, *supra*, and *Perry v. Sindermann*, *supra* — where a statute “does not merely deny a subsidy for [exercising a constitutional right],” but “deprives an otherwise eligible organization of [a subsidy] for all its activities, whenever one of those activities is [exercising the constitutional right].” *See* 103 S.Ct. at 2004 (Blackmun, J., concurring). The Government's attempt to draw support from the concurring opinion in *TWR* is laughable. The suggestion that § 399 is nevertheless valid because *Pacifica* would be free to

Indeed, the fact that Congress did not establish or approve any mechanism by which CPB-funded noncommercial broadcasters could continue to editorialize with nonfederal money lays bare the fallacy of the Government's contention that § 399 was enacted simply to ensure that the government does not pay for the stations' editorializing. If that had been its intent, Congress could easily have specified, as it does in myriad other contexts, that no portion of a CPB grant may be used to support that particular activity (*i.e.*, editorializing). *See id.* at 2002 (Congress could validly grant funds on condition that none of the money be used for lobbying); 18 U.S.C. § 1913. *See generally* Brief of Amicus Curiae ACLU at 23. In fact, CPB itself imposes such activity-specific limitations on its grants, and noncommercial stations maintain separate accounts in order to segregate the restricted funds they receive, not only from CPB but from a variety of different sources. *See generally* CPB, *Public Telecommunications Audit Guide and Requirements* (June 1980).

Nor is it without significance that § 399 is phrased as an express prohibition against editorializing by a CPB-funded noncommercial station, and that the penalty for its violation is not the withdrawal or repayment of the federal assistance, but direct sanctions against the station potentially leading to revocation of its license and imposition of criminal penalties.⁶¹ This, too, undermines the plausi-

editorialize on any unsubsidized station while continuing to operate a subsidized one is as ridiculous as asserting that the San Francisco Examiner could be prohibited from editorializing because its parent, the Hearst Corporation, can express its views in its Los Angeles paper, the Herald Examiner. And it would hardly comfort the readers in San Francisco to know that the residents of Los Angeles were receiving a full range of editorial viewpoints.

⁶¹The contrast between § 399's ban on all editorializing and § 501(c)(3)'s prohibition against "substantial lobbying" with federal subsidies is striking. As the Government explained in its brief in *TWR*, the Internal Revenue Code permits an organization, through election under § 501(h), to spend up to 30% of its exempt-purpose funds for lobbying activities and still qualify for § 501(c)(3) status. "The statute therefore represents a considered accommodation, to the extent consistent with the aims of the exempt organization provisions, of the First Amendment values inherent in legislative advocacy." *TWR*, Brief for Appellants 38-39 n.20. By contrast, § 399 contains no accommodation whatsoever of the First Amendment values inherent in either the noncommercial broadcaster's right of free expression or the public's interest in preserving a free marketplace of ideas.

bility of the Government's characterization of the statute. Instead, particularly when viewed in conjunction with § 399's imprecise fit and disturbing legislative history, these factors strongly suggest that the statute was designed to achieve just what it has produced — the complete suppression of noncommercial broadcasters' opinions on issues of public importance. This, then, is precisely the "very different case" referred to in *TWR* (see 103 S.Ct. at 2002; *id.* at 2004 (Blackmun, J., concurring)), the case in which the Court has consistently held that it is unconstitutional to condition the conferral of a government benefit upon the surrender of First Amendment rights.

CONCLUSION

For the above reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

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APPENDIX A

47 U.S.C. (Supp. V) 399, as amended by the Public Broadcasting Amendments Act of 1981, Pub. L. No. 97-35, Title XII, Section 1229, 95 Stat. 730, provides:

No noncommercial educational broadcasting station which receives a grant from the Corporation [for Public Broadcasting] under subpart C of this part may engage in editorializing. No noncommercial educational broadcasting station may support or oppose any candidate for political office.

APPENDIX B

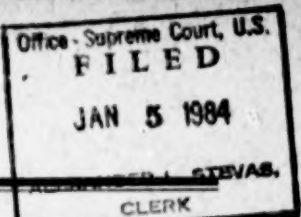
Editorials Broadcast by Station KNXT, Los Angeles

August 1-August 26, 1983

- | | |
|-----------------------------|---|
| July 29th and
August 1st | <i>Uninsured Motorists: Putting on the Brakes</i> — Supports proposed state bill that would impose additional fine on uninsured motorists receiving traffic citations. |
| August 1st
and 2nd | <i>Arson Watch</i> — Announces station's "anti-arson month," summarizing scheduled programming aimed at increasing public awareness of the crime of arson. |
| August 2nd
and 3rd | <i>Campaign Reform: Local Election Fund-Raising Laws</i> — Urges Los Angeles City Council's Charter and Elections Committee to reform election fund-raising laws, limiting the amount of money that can be raised, setting time limits, and reducing the potential for conflicts of interest on the City Council. |
| August 4th
and 5th | <i>Reply to an Editorial on Airport Free Speech; Emmett C. McCaughey, Airport Board Commissioner</i> — States that in restricting location of First Amendment activities to sidewalks in front of terminals at Los Angeles International Airport, Board of Airport Commissioners is properly reconciling needs of travelers and speakers. |
| August 5th
and 8th | <i>Hunters and Wildlife: Putting up the Bans</i> — Urges Park Service Advisory Commission to uphold present ban on hunting in Cheeseboro Canyon, a part of Santa Monica Mountains Recreation Area in Los Angeles. |
| August 5th
and 8th | <i>Reply to an Editorial on Cheeseboro Canyon to Be Kept Off Limits to Hunters; Bob McKay, Private Citizen</i> — Urges that hunting and related consumptive uses be permitted in Cheeseboro Canyon. |
| August 8th
and 9th | <i>Reply to an Editorial on Community Colleges; Todd Jones, Past Student President, Long Beach City College</i> — Argues that proposed community college tuition of fifty dollars per semester is reasonable and necessary. |
| August 11th
and 12th | <i>Community College Funding: Overriding the Governor's Veto</i> — Decries Governor's cut in funding of community colleges as pushing the neediest out of a system ostensibly intended to overcome their disadvantages through education. |

- August 12th and 15th *Reply to an Editorial on Campaign Finance Reform: Walter Zelman, Common Cause* — Emphasizes need for campaign reform at local level.
- August 15th and 16th *Pound Seizure: Deja Vu* — Speaks out against proposed state bill banning use of pound animals for medical research; but recommends strengthening of rules governing permissible treatment of lab animals.
- August 15th and 16th *Reply to an Editorial on Bus Bill: Sabrina Schiller, Coalition for Clean Air* — Agrees with KNXT's position against proposed state bill that would permit purchase by Southern California Rapid Transit District of polluting buses; recommends legislation to phase in buses that use clean-burning fuels.
- August 16th and 17th *Reply to an Editorial on Animals for Medical Research: Gretchen Wyier, Fund for Animals* — Urges support for state bill banning use of pound animals for medical research.
- August 18th and 19th *Arson: Squashing the Firebugs* — Stresses need for a local coalition of government agencies, police, fire-fighters, and insurance companies to fight arson.
- August 19th and 22nd *The Metropolitan Water District: Growing at Your Expense* — Takes stand against local water district's proposed rate increase.
- August 22nd and 23rd *The FBI Probe of EPA: Pulling Punches?* — Questions objectivity of FBI probe of EPA's delay in funding the cleanup of local Stringfellow Acid Pits.
- August 23rd and 24th *Orange County's Environmental Mis-Management Agency* — Criticizes Orange County Environmental Management Agency's choice of more expensive alternative means of installing water pipeline.
- August 24th and 25th *Re-Dedicating Resources to Child Abuse: Los Angeles County* — Supports Los Angeles County Supervisor's proposal for a new County Department of Child Abuse to investigate child beatings.
- August 25th and 26th *Drunk Driving Schools: Pass or Fail?* — Supports drunk driving school as an alternative to jail for first-time offenders, but emphasizes need for quality-control monitoring of schools.

No. 82-912



In the Supreme Court of the United States

OCTOBER TERM, 1983

FEDERAL COMMUNICATIONS COMMISSION, APPELLANT

v.

LEAGUE OF WOMEN VOTERS OF CALIFORNIA, ET AL.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

**REPLY BRIEF FOR THE
FEDERAL COMMUNICATIONS COMMISSION**

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*ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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REPLY BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

I

A. Appellees' brief paints a false picture of public broadcasting and distorts the role of Section 399 as one constituent element in public broadcasting's public charter. Appellees' fundamental thrust is to portray public broadcasting as an industry essentially no different from the ordinary private print media, existing—except for the receipt of small amounts of public assistance—in the identical atmosphere of “journalistic independence” (Br. 7).¹ Section 399 is then portrayed as an isolated, ill-motivated, crudely restrictive (and unnecessary) incursion into the “untrammelled freedom” (Br. 15) of these “independent journalistic entities” (Br. 4) to broadcast what and how they see fit.

In fact, this picture is quite false, an empty abstraction. As our opening brief explained (Gov't Br. 9-21, 28-32), Section 399 is one element in an intricate and special universe—institutional, financial, regulatory, and legal—that is quite inapposite to the ordinary print media. This is a universe in which no one may publish at all without a license from the government granted in return for the legally enforceable undertaking to operate for the public

¹ “Br.” refers to appellees' brief.

interest, convenience and necessity. Broadcasters, unlike other journalistic entities, must take account of the needs of their local communities; must give coverage to public affairs; must, in doing so, be "fair" in reflecting differing viewpoints; and must afford a right to reply to persons who have been attacked and candidates who have been opposed. In the case of public broadcasting, these "independent journalistic entities" must themselves be either government entities or nonprofit organizations. They may not sell or accept advertising (including political advertising); are subject to special rules of financial disclosure, accounting, and employment practices; and are obligated to broadcast programming which is "primarily designed for educational or cultural purposes" (47 U.S.C. 397(9)). The public broadcasting system is to achieve "strict adherence to objectivity and balance in all programs or series of programs of a controversial nature" (47 U.S.C. (Supp. V) 396(g) (1) (A)); may not endorse or oppose political candidates; and—in the case of the vast majority of public stations that are tax-exempt—must refrain from "propaganda" and "influenc[ing] legislation" (26 U.S.C. 501(c) (3)). See Gov't Br. 16-17.

Why does this elaborate regulatory universe exist? What justifies its restrictive elements? The explanation lies, as we showed in our opening brief, in the fact that public broadcasting as we know it today was not simply a product of the private sector, an industry differing only technologically from the print media. Public broadcasting is the product of a substantive national commitment to foster and support special broadcast services of a sort *not* provided by the private sector. In the case of the print media (and even in the case of commercial broadcasting), the notion of a national undertaking to achieve an animating substantive end is quite foreign. But public broadcasting in its present form exists because of a public decision that we needed it and wanted it.

This public commitment is manifested by public support: special provisions giving sustenance to and protecting broadcasters qualified to render the special broadcast services the private sector could not provide. When it

became apparent that noncommercial organizations could not successfully compete with commercial firms, the federal government reserved special channels exclusively for noncommercial use and thereby insulated public broadcasting from the harsh competition of the commercial world.² When it became apparent that private financial support of noncommercial broadcasting was seriously and chronically deficient, government furnished large subsidies. Grants were first provided for the construction of public broadcasting facilities; more important, since 1967 virtually every public station has also received a steady stream of major government aid to support all aspects of station operations. Additional assistance comes in the form of critical tax subsidies. State and local governments and their instrumentalities, which own fully two-thirds of all public stations,³ have also provided im-

² Appellees disparage the importance of these reservations (Br. 3 n.6). It is clear, however, that without the reservations virtually all available VHF television stations in major cities would have been occupied by commercial broadcasters. See Gov't Br. 12-13 & nn.17, 20. In fact, only 15 (about 5%) of a total of over 290 public TV stations operate on nonreserved channels. Of these, 4 are VHF stations and 11 are UHF stations. Only 4 of the 15 operate in major markets (channels 13 and 31 in New York City, ch. 17 in Buffalo, and ch. 9 in Kansas City, Mo.). The remainder are: ch. 65 in New Haven, Conn., ch. 47 in Peoria, Ill., ch. 49 in Muncie, Ind., chs. 29 and 31 in Paducah and Owensboro, Ky., ch. 6 in Sedalia, Mo., ch. 12 in Cheyenne, Okla., chs. 49 and 30 in Columbia and Rock Hill, S.C., and chs. 6 and 46 in Harlingen and Killeen, Texas. See 47 C.F.R. 73.606; CPB, 1982 CPB Public Broadcasting Directory 66-68. It should also be pointed out that in New York City, where no VHF reservation was made, commercial stations did occupy all available VHF stations. In order to create a noncommercial VHF outlet for New York City, extraordinary efforts had to be made; eventually, in 1962 a noncommercial group was allowed to buy—for 5.75 million—a commercial station assigned to Newark, N.J.! See the account in E. Barnouw, *The Image Empire* 199-200 (1970).

³ Appellees' statistics (Br. 26 & n.37) regarding the ownership of public broadcasting stations are incorrect or misleading. The figure of 1400 stations includes radio stations ineligible for CPB grants. These are stations that operate "only part-time, at very low

portant subsidies. Direct government assistance now totals 59% of public television income and 67% of public radio income. See Gov't Br. 11-21. The primitive educational broadcasting of the 1950s has grown into the public broadcasting system of today due in very large measure to this governmental support.⁴

power, or with a very low budget." Carnegie Commission, *A Public Trust* 40 (1979). As noted in our opening brief (at 20-21 & nn.43-45), two-thirds of all public television stations and nearly three-fifths of the eligible public radio stations are licensed either to state or local governments, state-appointed authorities or commissions, or public colleges and universities. (In 24 states, *all* public TV stations are licensed to such governmental licensees.) Thus, it is not true that "[t]he majority of CPB recipients are private, community-based educational corporations" (Br. 26 n.37). Appellees assert that 82% of the public stations receiving CPB grants were operated in 1981 by "private nonprofit educational foundations or institutions of higher learning" (*ibid.*) We are unable to replicate the arithmetic that produced this figure. Even on its face the statement obscures the fact that the overwhelming majority of university and college licensees are public institutions operated by state or local governments or their instrumentalities (*e.g.*, boards of regents). See CPB, *1982 CPB Public Broadcasting Directory* 18-50, 66-68.

⁴ Attempting to minimize the importance of federal support for public broadcasting, appellees state (Br. 25) that public broadcasting "flourished for almost fifty years without a penny of federal aid." But the Carnegie Commission writing in 1967 took a very different view: "[L]ocal stations, as they are now constituted, are inadequate for the ends they must serve. There are not enough of them. Those that exist are inadequately staffed, inadequately equipped, and inadequately financed. Deficiencies affect the entire system; even the few stations that provide leadership for educational television wage a daily struggle for survival." (Carnegie Commission, *Public Television—A Program for Action* 33 (1967).)

Appellees point (Br. 3) to the fact that hundreds of noncommercial stations were begun in the early days of radio. More instructive, however, is the fate of these stations. By 1934, "[m]ost * * * had encountered insuperable financial difficulties and discontinued operation." Comment, *The Legal Problems of Educational Television*, 67 Yale L.J. 639, 642 (1958).

Appellees repeatedly suggest (see Br. 8, 9 n.19, 23, 41) that a significant segment of public broadcasting does not receive funds from the Corporation for Public Broadcasting. But as we made clear in our opening brief (at 26), at last count *all* public television

What we have here, then, is a complex and sophisticated compact between the public and private sectors. The limits placed on public broadcasters are important constituents of an affirmative goal, not extraneous restrictions on the freedoms of ordinary "independent journalistic entities." They are designed to assure that the public broadcast system will achieve the ends for which it was created. Government and private contributors rightly expect that public stations will remain true to their public mission, that they will adhere to high standards of program content, that they will not duplicate what is aired on commercial stations, and that they will serve all segments of the public rather than seeking to promote a narrow set of private goals.

Similarly, Section 399 is not, as appellees suggest, a superfluous encumbrance appended to public broadcasting for base motives. Rather, it is an integral element of public broadcasting's public charter. It helps to ensure that public stations remain "public" and serve their intended purpose. The use of public stations to further partisan political and ideological ends would be a breach of public broadcasting's compact with the government and the people. Congress has repeatedly expressed its judgment that public broadcasting can fulfill its public purposes only if it refrains from electioneering and editorializing. Allowing such practices, in Congress's view, would invite government pressure; would unfairly devote public moneys to the propagation of private views; would place an official imprimatur on certain views while disfavoring others; and would jeopardize the broad public support that public broadcasting requires. As Senator Hollings put it when he opposed amendment of Section 399 in 1978, "if we allow editorializing or sponsorship of political candidates, it could be the death knell of public broadcasting." 124 Cong. Rec. 30059 (1978).

stations and 90% (i.e., all but 24) of the eligible public radio stations received such aid. Those radio stations ineligible for CPB aid are small, low power, part-time operations. See Gov't Br. 18 & n.33, 26 & n.54.

B. Appellees play a coy game of hide-and-seek with this institutional and regulatory universe surrounding public broadcasting. They are careful never explicitly to challenge its validity. (In fact, when they argue that Section 399 is unnecessary, restrictions on broadcasters such as the fairness doctrine—restrictions that would plainly be invalid as applied to *ordinary* “independent journalistic entities”—come leaping out of the closet to demonstrate that Section 399 is superfluous.) But the First Amendment standard used by appellees to test the “editorializing” part of Section 399—that the government must “demonstrate that [the prohibition] is the most narrowly drawn regulation necessary to further a compelling state interest”⁵ (Br. 13), and that the government must eschew any restriction that constitutes “the slightest intrusion into the licensee’s journalistic independence” (Br. 7)—plainly casts doubt on restrictions

⁵ As set out in our opening brief (at 30-32), *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) authoritatively rejects the assertion that the conventional “compelling state interest” test is apposite for broadcasting. Appellees attempt to distinguish *Red Lion* (Br. 18-20) by contending that the fairness doctrine does not limit a broadcaster’s right to “air[] its own opinions” (Br. 19) and thus does not restrict the right to speak. This very contention was rejected in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), where it was argued that a statute requiring a newspaper to print replies by political candidates it had criticized or attacked did not “amount to a restriction of [the paper’s] right to speak” because the paper was not precluded from saying anything it wished (418 U.S. at 256). The Court wrote (*ibid.*): “Compelling editors or publishers to publish that which ‘reason’ tells them should not be published’ * * * operates as a command in the same sense as a statute or regulation forbidding [the paper] to publish specified matter.”

Appellees (Br. 18-19) rely upon the statement in *Red Lion* (395 U.S. at 396) that “refusal to permit the broadcaster to carry a particular program or to publish his own views * * * would raise more serious First Amendment issues.” (Appellees (Br. 18-19) delete the word “more” from this statement.) However, under Section 399, a public station is free to express all views, but like other speakers whose opinions are entitled to equal weight and respect, it cannot describe any particular view as the “official” view of “the station.”

such as the fairness doctrine, the "right to reply" rule, and the "no propaganda" rule.

The point is vividly illustrated by appellees' stance with respect to the portion of Section 399 that forbids public broadcasters—unsubsidized or subsidized—from "support[ing] or oppos[ing] any candidate for political office." Appellees' suit as originally framed attacked Section 399 in its entirety. However, in the district court, appellee Pacifica eventually disclaimed any intention to endorse political candidates. This enables Pacifica now to claim piously that the "ban on political endorsements is not at issue here" (Br. 9 n.20). Apparently conceding our principal point—that it is legitimate for Congress to act to preserve the nonpartisan nature of public broadcasting—they then use the existence of this ban to show that Congress's fear of partisanship was unfounded because this provision of Section 399 "would fully protect against such concerns" (Br. 22 n.31). But if appellees are also correct in their assertion that, "[b]y prohibiting the broadcaster from expressing its opinions on public issues, the statute muzzles one of the very institutions that the Constitution selected to inform society and keep it free" (Br. 10), surely the point must apply a fortiori to the broadcaster's opinions on who should be elected to public office. If "the untrammelled freedom of the media to express its views is * * * indispensable to its dual societal responsibilities as educator and watchdog" (Br. 15)—and applies in an undifferentiated way to public broadcasters—why isn't it "indispensable" to leave the broadcaster "untrammelled freedom" to give "its views" on the central question of democracy: who should be elected? In fact, it is clear that the First Amendment theory deployed by appellees to invalidate the ban on "editorializing" in Section 399 *must* apply to invalidate the special ban on editorializing for or against candidates.⁶

⁶ It is equally clear that appellees' protestations with respect to the latter prohibition are wholly tactical, good for this day and this lawsuit only.

The point illustrates the central problem of appellees' submission in this Court. They invent a system of public broadcasting consisting of "independent journalistic entities" possessing "untrammelled freedom" to do whatever management wishes—except for the isolated and crude restriction on editorializing. At the same time they dismiss this restriction as unnecessary by positing the existence of a pervasive regulatory structure—designed for the (momentarily) valid purpose of maintaining a public broadcasting system that is fair and nonpartisan—forgetting that this structure is also quite inconsistent with the broadcaster's "untrammeled freedom." They go on to disparage the public's contribution to public broadcasting in order to obscure the fact that that contribution has a substantive purpose—to create a special sort of broadcasting that otherwise would not exist. And this point has to be obscured so that the so-called "restrictions" on public broadcasters—among them Section 399's ban on editorializing and electioneering—will not be seen for what they are: affirmative elements necessary to the existence of that sort of broadcasting. The *point* of the restrictions—"you may not operate for profit"; "you may not advertise"; "you must be 'cultural' and 'educational'"; "you may not become a partisan voice"—is not to restrict the independence of "independent journalistic entities," but to help create—to conjure forth—a sort of institution that the public could not otherwise have.

Our central submission is that Section 399 must not be viewed in isolation, in the abstract. Its meaning, and thus its validity, must be assessed in the context of the special sort of institution that is public broadcasting—publicly fostered and publicly funded in order to achieve public purposes. In that context, prohibiting public licensees from partisan electioneering and editorializing and from giving an official imprimatur to selected private views and opinions makes eminent sense and in no way prejudices the public interest in having access to any and all views and opinions on all issues of general concern.

II

Appellees grossly overstate the impact of Section 399 (e.g., Section 399 "suppress[es] speech on the basis of its content"⁷ and "infringes upon the paramount right of the public to receive information from a diverse range of sources" (Br. 10); Congress acted on the premise that it "can shape [noncommercial broadcasting] in its own image by banning the expression of any controversial views" (Br. 11)). In fact, Section 399's prohibition is both modest and sensible. It prohibits public stations from stating or otherwise indicating that a particular view is "the official opinion of the licensee or its management" (*In re Complaint of Accuracy in Media, Inc.*, 45 F.C.C.2d 297, 302 (1973)). It merely precludes them from saying, "this editorial represents the views of this station or its management."⁸

What Section 399 prohibits—the official endorsement of a particular viewpoint by the management of a public station—would, in the context of public broadcasting, often be confusing and misleading. One portion of the audience would assume that a "public" station's views were those of the federal, state, or local government. Others would think that the station was a wholly independent authority. In a particular case, each view could be dramatically wrong. Few viewers or listeners understand who "runs" their local public station, the outside

⁷ To say that the ban on editorializing "suppress[es] speech on the basis of its content" constitutes a play on words. Section 399 does regulate certain forms of speech; but it is not content-related in the sense that it places restrictions upon the expression of a particular "viewpoint" or discussion of a particular "topic." *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 537-538 (1980). Section 399 does not single out ideas or viewpoints for favorable or unfavorable treatment. It merely says that the management or owners of the stations may not endorse any particular idea or opinion as the "official" idea or opinion of "the station."

⁸ As appellees acknowledge (Br. 37), "the very same opinions that cannot be expressed by the licensee could be broadcast if they were mouthed by a station commentator, by a guest being interviewed, or by a person who simply walks in off the street."

forces that influence management's expressed views, or how and why management came to be given the opportunity to use the public airwaves and public funds to express those views.

Amicus ACLU argues (Br. 22) that "[t]he audience could be protected from any confusion over whether editorials by noncommercial broadcasters are expressions of governmental views by a disclaimer to the contrary, accompanying each editorial."⁹ But due to government ownership and funding of many stations, such a blanket disclaimer could be highly misleading. On the other hand, an accurate explanation of the intricate relationship between a public station and government would be complicated and confusing. Section 399's prohibition of editorializing eliminates audience confusion by simpler means and without imposing an appreciably greater restriction upon a licensee's expression. Instead of requiring a public station to explain its relationship with government, the broadcaster may present any and all views—including his own—but without an official endorsement. The views can then attract whatever interest or following they merit.¹⁰ That seems the very essence of a free marketplace of ideas.

Appellees suggest (Br. 19) that Section 399—unlike the fairness doctrine—limits what a licensee may say

⁹ Cf. 47 U.S.C. 317(a), (c) (broadcast station must make diligent effort to learn and must announce true sponsor of paid broadcast).

¹⁰ There is no inconsistency between Section 399 and the FCC's encouragement of editorializing by commercial stations (compare Br. 16-18, 36-37). Because commercial stations are privately owned and not dependent upon government subsidies, they are far less susceptible to government influence. Since they must make a profit to survive, they do not offer a publicly-funded target for those interested in propagandizing. And since commercial stations are sustained by private revenue, no one can legitimately complain that his tax dollars are being used to subsidize the commercial broadcaster's partisan opinions. Furthermore, commercial stations have not been fostered and protected to serve as a community resource in the same way as their noncommercial counterparts. Finally, the public understands that commercial stations are private institutions and can weigh their editorials accordingly.

rather than insuring access to a wide variety of views. In fact Section 399 serves the same purpose as the fairness doctrine: it promotes *equal* access for all viewpoints. Appellees state (Br. 37) that the station management's voice is "the one voice that most rightly should be heard." Why? This Court made it clear in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 389 (1969), that "as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused." Is the management of a public station entitled to a preference because it has received the further benefit of broadcasting on a special reserved frequency and is thereby protected from the competition of the commercial world? Or because the public station receives and in most instances depends upon public funds? ¹¹

Finally, we reiterate one further point. Section 399 does not "suppress" the publishing of the information that the management of Pacifica endorses a particular viewpoint. Section 399 leaves Pacifica exactly where all other citizens are—free to propagate its endorsements in all media except the subsidized public radio stations of which it happens to be the trustee. Indeed, it can editorialize to its heart's content even on its stations, if only it is willing to forego the federal trough. Given Pacifica's characterization of federal aid as being of negligible importance ("barely one-fifth of noncommercial broadcasting's income and * * * less than half the sum raised from wholly private, non-governmental sources" (Br. 25-26)), refusing Corporation for Public Broadcasting grants should not represent a major sacrifice.

III

In our opening brief, we argued that Congress promoted First Amendment values by fostering and sustain-

¹¹ Appellees assert (Br. 12) that Section 399 is unconstitutional because "[t]he remedy for any feared imbalance in the marketplace of ideas is more speech, not less speech." In the present context, this is an empty slogan. Since there can be but one official "station" viewpoint on an issue, how can the remedy be more speech? Every view cannot be "official."

ing an independent public broadcasting system. With detailed references to the legislative history, we showed (Br. 21-28) that Congress designed Section 399 to protect the independence of that system. More specifically, we explained (Br. 33-40) that Section 399 was designed to serve a variety of important interests: discouraging the capture of public stations by narrow partisan or ideological groups; protecting the central mission of these stations—providing the public with a diverse and excellent programming unavailable on the commercial airwaves—from the embroilments attendant on the propagation of partisan ideological and political ends; protecting against the use of public stations for government propagandizing; and preventing the use of taxpayer money to promote private views.

Ignoring our discussion of the legislative history, appellees (Br. 21-24; see also CBS Br. 28-29) respond that Section 399 was enacted solely for the “illegitimate purpose” of protecting incumbents against editorial criticism. The “evidence” adduced for this ugly charge (Br. 22 & n.32) consists of four statements in the debates. Two of these turn out to have been made by representatives who voted against Section 399 and the Public Broadcasting Act;¹² the other two are innocuous.¹³ Surely this

¹² 113 Cong. Rec. 26417 (1967) (votes of Reps. Devine and McClure).

¹³ Representative Springer (113 Cong. Rec. 26387-26388 (1967)) expressed his opposition to political endorsements by noncommercial stations, a practice appellees purport not to defend. Representative Keith (113 Cong. Rec. 26391 (1967)) was making the valid point that an administration film promoting its legislative program could have been used against opposing congressmen. The broadcasting of such federal government propaganda on public stations is just the mischief that Section 399 was properly designed to prevent.

Appellees' argument is not bolstered by its citation of secondary sources and a lower court opinion that rely on these same statements (Appellees' Br. 24 n.34; see also CBS Br. 29 n.57; ACLU Br. 21 n.11).

CBS cites three additional statements (Br. 29 n.56), including two by members of Congress who did not support the bill (113 Cong. Rec. 26417 (1967) (vote of Rep. Moss); 113 Cong. Rec. 12992

is an inadequate basis for impugning the motives of the hundreds of members of Congress from both political parties who enacted Section 399 in 1967, who voted to retain it in 1978, and who gave it its current form in 1981.

A. When they finally turn to the actual reasons that animated Congress in enacting, retaining, and amending Section 399, appellees urge this Court cavalierly to dismiss Congress's concerns on the ground that these were "entirely speculative" and find "no support in the record" (Br. 24).¹⁴ We take this to mean that Section 399

(1967) (remarks of Sen. Thurmond)). The third, which is unobjectionable, is discussed in our opening brief (at 22 n.46). (See also ACLU Br. 21 n.11 citing same statement.) CBS seems to suggest (Br. 29 n.57) that any expression of congressional concern about controversial editorials on public stations was illegitimate. But there would be good cause for concern if such editorials evidenced capture of public stations by narrow ideological groups or if such editorials resulted from political interference. And the use of taxpayers' money to pay for any such editorializing is certainly grounds for misgivings.

¹⁴ Appellees' other major argument (Br. 31 & n.45, 33) concedes that Congress's concerns were real but asserts that they were—apparently unbeknownst to Congress—already taken care of by the fairness doctrine and by Section 399's ban on political endorsements. We have already commented (see pages 6-8, *supra*) on the ironies created by such tactical deployment of legislative and administrative measures that are plainly invalid under appellees' own suggested First Amendment standards. In any event, we do not think it appropriate for the courts to do what the court below did—that is, to make its *own* ad hoc judgment about what exact "mix" of remedies is appropriate to avert the evils apprehended by the legislature. Congress was quite reasonable in concluding that the fairness doctrine is not a substitute for the command of Section 399 that publicly funded public stations not give official endorsement to particular views or to particular candidates.

Appellees also reiterate the suggestion (Br. 6-7, 32) that Congress's concerns in 1967 were misplaced because Congress had already solved the problem of political influence on public broadcasting by insulating the Corporation for Public Broadcasting from politics. In fact, Congress was prescient in regarding that insulation as insufficient. In 1979 the Carnegie Commission concluded: "Since the federal government legislated operating support for public broadcasting in 1967 the industry has witnessed episode after

is unconstitutional unless it is shown that the evils addressed by Section 399 had already occurred. But no such absurd rule exists. Congress in 1967 was setting on foot a new and costly public enterprise. *Of course* it was "speculating" about risks to be avoided and evils to be guarded against. That is what Congress is paid to do. In this case these risks and evils related to matters with which elected officials are all too familiar: the use of money to influence and the attraction of money for those ready to be influenced. Broadcasting is an especially inviting and valuable target for such influence. Public television and radio stations are powerful tools in the political arena. Two thirds of these stations are actually owned by agencies of state and local government; 59% of public TV income and 67% of public radio income comes from direct government grants. The "speculation" that, in the absence of Section 399, decisionmaking with respect to what editorial positions to take and what candidates to endorse could be strongly (and, what's worse, invisibly) affected by the federal, state and local government officials exercising these powers and holding these purse-strings—or by fear of them—is powerfully plausible. The converse "speculation"—that the funding process would be politicized if recipients engage in partisan ideological and political editorializing—is equally realistic. Abuses have, in fact, been documented.¹⁵

episode seeming to justify the fears of interference expressed by many stations when federal support was first proposed." Carnegie Commission, *A Public Trust* 101 (1979).

¹⁵ See Gov't Br. 24, 36-37 & n.66.

Appellees descend to the argument that fear of government influence makes no "intuitive sense" (Br. 33) because stations wishing to ingratiate themselves with government will find it difficult to figure out what is the correct government "line" or which government unit to please. This is like saying that bribery is no problem as long as the bribers' instructions are ambiguous or as long as there are lots of people of different views passing out bribes.

Appellees maintain (Br. 32 n.46) that preventing state and local government from influencing the editorial positions of public stations was not one of the purposes of Section 399. The legislative

Nor should the concern that public TV and radio could become an inviting target for "capture" by ideologically and politically partisan groups be casually dismissed.¹⁶ Appellees assert that no such capture had been "recorded" (Br. 30) (recorded how? where?) before Section 399 was enacted. But Section 399 was enacted at the very time when the country was first committing itself to the proposition that noncommercial broadcasting should become a strong, publicly supported and massively financed enterprise. Congress's "speculation" that this commitment would make public broadcasting a new and seductive target was surely not frivolous.

B. In answering our contention that Section 399 is also justified because it prevents the use of tax dollars to subsidize private propagandizing, appellees argue that "every medium is infused with some form of direct or indirect [federal government] support" and that "[i]f the existence of such support were deemed sufficient to justify restricting the recipients' freedom of speech, the First Amendment would soon become meaningless" (Br. 27). But appellees misconceive our submission. We do not suppose that the existence of government "support"

history of Section 399 shows that this was a clear congressional concern (see Gov't Br. 24-25 & n.53).

The assertion that Section 399 seeks illegitimately to "silence" the voice of state and local government (Br. 32 n.46; see also PBS Br. 13 n.13) is absurd. We agree that state and local government officials "retain the right to communicate their opinions on important public issues" (Br. 33 n.46). Section 399 in no way narrows that right. What it prohibits is the use of a public station to *endorse* such an opinion (or such an official) as "the" opinion (or candidate) of "the station."

¹⁶ Some might conclude from published accounts that Pacifica's licensees themselves are hardly nonpartisan. See N.Y. Times, Feb. 28, 1977, at 26, col. 1; N.Y. Times, Feb. 22, 1977, at 62, col. 1; N.Y. Times, Feb. 12, 1977, at 1, col. 1; N.Y. Times, Mar. 24, 1975, at 34, col. 1; N.Y. Times, June 12, 1971, at 35, col. 6; N.Y. Times, Sept. 4, 1969, at 95, col. 3. These accounts in any event indicate that Pacifica's licensees have never been inhibited by Section 399 from the robust presentation of controversial views.

in any form automatically creates a right in the government to "suppress" the recipient's freedom of speech. Nor do we argue that tax funds unfairly "subsidize" the private views of any person who is supported—for instance through welfare or social security—by federal funds. We make only a narrow—but important—point. When Congress, in order to increase the diversity of the media, commits federal funds to the support of special forms of broadcasting that the private sector cannot provide, it has a special responsibility to assure that it is the aim of diversity that is served, and that tax dollars will not be captured to propagate a narrow range of private viewpoints. Public broadcast stations are a scarce and powerful resource. Most listeners can receive only one public TV station (see Gov't Br. 18 n.36). In the circumstances we believe that Congress was completely justified in concluding that it would be most unfair to devote a listener's tax dollars to the support of that station only to have that station use its privileged position to propagate as "official" a position with which that listener disagrees.¹⁷

C. Appellees' final onslaught on the purposes of Section 399 (Br. 34-40) consists of a litany of complaints that the statute either prohibits too much or too little. Thus Section 399 is said to be too broad because it "prohibits editorializing on all issues, not just those expressing partisan or 'pro-government' opinions" (Br. 34-35)—ignoring the fact that a statute prohibiting only "pro-government" editorials would plainly be void as both

¹⁷ The situation of the viewer is completely different from the person who dislikes the editorial position of a magazine that enjoys low postal rates; that person can easily shift to another magazine that enjoys the same benefit and whose editorial position he prefers.

When the federal government supports political candidates through the Presidential Campaign Fund, the funds are widely distributed so that the "scheme involves no compulsion upon individuals to finance the dissemination of ideas with which they disagree." *Buckley v. Valeo*, 424 U.S. 1, 91 n.124 (1976).

content-related and vague.¹⁸ On the other hand, Section 399 is attacked as underinclusive because it "outlaws only the licensee's *editorial* speech and imposes no restriction on any other aspect of the broadcaster's public affairs programming" (Br. 36; emphasis in original)—ignoring the fact that under appellees' own analysis any statute that was broader than Section 399 in regulating propagandizing would be a *fortiori* unconstitutional.¹⁹ Finally, appellees complain (Br. 38) that Section 399 is underinclusive because its prohibition on editorializing applies only to stations that receive CPB funds—ignoring the fact that unsubsidized stations are clearly less susceptible to government influence than subsidized ones.²⁰

In fact, no statute could survive appellees' method of analysis, which (under the guise of least restrictive alternative analysis) simply invites the Court to engage in an illegitimate *ad hoc* second-guessing of the details of the regulatory scheme Congress adopted.²¹

¹⁸ Appellees themselves acknowledge that such a statute would be unconstitutional (Br. 34 n.48).

¹⁹ In fact, the line drawn by Congress in limiting the prohibition to official "editorializing" is wholly sensible. The fairness doctrine can guarantee that many views will be represented on a station, but cannot manufacture more than one "official" view. If an "official" station view is to exist at all, it cannot be "balanced" or "objective" or "unbiased."

²⁰ We repeat that there are no public television stations and only 24 full-service public radio stations that receive no CPB funds.

Appellees' suggestion (Br. 41 n.56) that the 24 full-service stations not subsidized by CPB funds in fact receive significant funding from other federal sources is not supported by the sources they cite or by anything else in the record.

²¹ For the same reason, appellees' equal protection attack (Br. 40-42)—which largely replicates the recital of over- and underinclusiveness just discussed—is without merit.

Appellees' equal protection argument relies on *Carey v. Brown*, 447 U.S. 455 (1980), and *Police Department v. Mosley*, 408 U.S. 92 (1972). Those cases concerned laws restricting expression based upon its subject matter. In both cases, the Court struck down provisions prohibiting nonlabor picketing. In *Carey* the Court stated (447 U.S. at 461; emphasis added) that the statute "ac-

IV

In our opening brief, we argued (at 42-47) that Section 399 is a valid exercise of Congress's Spending Power. We noted that the statute permits public stations to editorialize but withholds subsidies from stations that do so.

Relying on *Perry v. Sindermann*, 408 U.S. 593 (1972), *Speiser v. Randall*, 357 U.S. 513 (1958), and similar cases, appellees maintain (Br. 42-47) that Section 399 impermissibly conditions the receipt of a benefit on the relinquishment of a constitutional right. As we explained in our opening brief (at 45-46), however, this case does not "fit[] the *Speiser-Perry* model" (*Regan v. Taxation With Representation*, No. 81-2338 (May 23, 1983) ("TWR"), slip op. 5).²² In those cases, the benefits did not operate as a subsidy of the recipients' expression.²³

cord[ed] preferential treatment to the expression of views on one particular subject." In *Mosley* the Court observed (408 U.S. at 95; emphasis added) that "[t]he central problem with [the] ordinance is that it describes permissible picketing in terms of its subject matter." For this reason, the Court concluded (*Carey*, 447 U.S. at 461-462) that the laws had to be "finely tailored to serve substantial state interests, and the justifications offered for any distinctions * * * [had to be] carefully scrutinized." See also *Mosley*, 408 U.S. at 98-99, 101. Section 399, on the other hand, does not draw distinctions based upon subject matter. It merely proscribes the official endorsement of views by the management of publicly funded noncommercial stations.

Since the district court did not decide the Equal Protection issue (see J.S. App. 18a-20a), this Court need not address it. *Ramsey v. Mine Workers*, 401 U.S. 302, 312 (1971); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

²² Neither appellees nor their amici have even attempted to distinguish the Court's unanimous decision in *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978), which held that cases like *Perry* and *Speiser* do not apply to content-neutral laws (See Gov't Br. 46).

²³ Nor was there any trace of government subsidy involved in *McDaniel v. Paty*, 435 U.S. 618 (1978) (see Br. 44 n.58) (statute prohibiting clergy from serving as delegates to state constitutional convention unconstitutional because it conditions the right to be a delegate on relinquishment of right to free exercise of religion), or in *Sherbert v. Verner*, 374 U.S. 398 (1963) (see Br. 43) (unconsti-

Even more important, the restrictions held unconstitutional had no functional relationship to the affirmative purposes being served by the government funding. Here, on the other hand, Section 399 is part of a substantive system necessary to achieve the goals to be promoted by the government's funding.

In our opening brief (at 43-45), we argued that this case is governed by *Regan v. Taxation With Representation, supra*. Appellees assert (Br. 44-45) that TWR is distinguishable because there an organization receiving tax benefits under Section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. 501(c)(3), was not required to give up those benefits in order to engage in "substantial" lobbying. Such an organization, appellees note, could create an affiliate under Section 501(c)(4), 26 U.S.C. 501(c)(4), to carry on those activities. Appellees appear to argue that the present case differs from TWR because here Pacifica cannot operate two public radio stations (one subsidized station barred from editorializing and one non-subsidized station free to editorialize) in each city in which it now has a license.

But in fact—and even on this highly attenuated reading of TWR—Section 399 does not prevent Pacifica from taking any editorial position on any issue in any communications medium. It is free to editorialize in print, to buy time on commercial stations, or to broadcast editorials on any of its existing stations that do not receive CPB funds. Moreover, Pacifica is not legally barred from operating a second, unsubsidized, noncommercial station in the cities where it now has outlets. See 47 C.F.R. 73.240(b), 73.636(b) (ownership of multiple non-commercial FM or television stations in same area not barred). Of course, in order to obtain additional licenses, Pacifica would have to show that any proposed station would serve the public interest, convenience, and necessity (47 U.S.C. 309(a)) and would have to satisfy all other licensing requirements. But Pacifica has no First Amendment right to obtain a new license.

tutional to deny unemployment benefits to those who refuse on religious grounds to work on Saturdays).

Appellees argue (Br. 46) that in exercising its Spending Power Congress can do no more than prohibit the direct use of federal funds to subsidize editorializing. They therefore suggest that Congress has no legitimate right to object so long as the relatively small sums needed to pay the direct incremental costs of producing and broadcasting editorials are raised from other sources. This argument makes no sense as economics or law. Federal operating funds are unrestricted and infuse the entire operation. Without those funds, there might be no staff members to write, edit, or deliver an editorial; no station support staff; no popular programs to attract an audience or stimulate private contributions; and no studio, antenna, or broadcast facilities. Thus, there can be no doubt that, absent Section 399, the federal government would be providing a significant subsidy for editorializing.²⁴ The government should not be forced to choose between abandoning assistance for public broadcasting and subsidizing editorializing by those groups or persons who happen to have control of public stations.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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²⁴ The Court has held that use of a federally funded building for sectarian instruction or religious worship constitutes federal aid to religion even if the direct costs of such use (heat, lighting, etc.) are paid from private funds. *Tilton v. Richardson*, 403 U.S. 672 (1971). The same principle is applicable here.

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No. 82-912.

**In the
Supreme Court of the United States.**

OCTOBER TERM, 1983.

FEDERAL COMMUNICATIONS COMMISSION,

APPELLANT,

v.

LEAGUE OF WOMEN VOTERS OF CALIFORNIA, ET AL.

APPELLEE.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA.**

**Brief on Behalf of the American Civil Liberties Union,
as Amicus Curiae.**

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No. 82-912.
In the
Supreme Court of the United States.

OCTOBER TERM, 1983.

FEDERAL COMMUNICATIONS COMMISSION,
APPELLANT,

v.

LEAGUE OF WOMEN VOTERS OF CALIFORNIA, ET AL.
APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA.

**Brief on Behalf of the American Civil Liberties Union,
as Amicus Curiae.**

Interest of Amicus ACLU.

The American Civil Liberties Union is a nationwide non-partisan organization of over 250,000 members, dedicated to preserving and protecting the fundamental rights of the people of the United States. Foremost among those liberties are the freedoms of speech and of the press, and the ACLU has been active in this and other courts in defense of those freedoms against laws limiting the flow of information the First Amendment was enacted to secure.

The law at issue here substantially abridges First Amendment rights by withholding from the American people editorials which certain broadcasters wish to broadcast at private expense. More importantly, the theory relied on by the United States to support the prohibition would enable the government to infringe protected freedoms on the basis of acceptance of any government benefit, no matter how small. Because the law challenged here is such a direct infringement of and threat to constitutional rights, as the Ninth Circuit recognized and as the Department of Justice had previously understood, we submit this brief *amicus curiae*. *

Statement of the Case.

Appellees¹ initiated this lawsuit to protect their respective First Amendment rights to express and to receive the views of noncommercial broadcasters on issues of public interest and importance.

The District Court ruled that 47 U.S.C. sec. 399 directly violates these fundamental rights by banning speech clearly protected by the First Amendment. The Court concluded that this invasion of First Amendment freedoms is unsupported by any compelling governmental interest. This appeal ensued.

¹ Appellees include the League of Women Voters of California, a non-profit, non-partisan organization whose purpose is to promote political responsibility through the informed and active participation of citizens in the democratic process; appellee Pacifica Foundation, a non-profit, non-governmental, educational corporation owning and operating noncommercial educational broadcasting stations in five major United States markets; appellee Henry Waxman is a United States Congressman who regularly listens to and views noncommercial radio and television broadcasts.

* Letters from the parties consenting to the filing of this brief are being lodged with the Clerk.

Summary of Argument.

In banning editorializing by broadcasters receiving grants from the Corporation for Public Broadcasting, 47 U.S.C. sec. 399 censors private speech. The provision does not merely decline governmental subsidy for broadcaster editorials; it actually forbids the use of nonfederal monies for such editorials once the broadcaster receives a federal grant. This incursion on First Amendment freedoms cannot be justified by the federal government's involvement in public broadcasting. If First Amendment freedoms can be bypassed by the simple assertion of such governmental presence, few First Amendment rights would survive in the modern environment of pervasive governmental interaction with the private sector. In effect, the government's theory sanctions censorship by the carrot rather than by the stick.

Although First Amendment limits on governmental regulation differ in the broadcasting context from other arenas, broadcast regulations still must satisfy the Constitutional requirements of weighty governmental interests and means carefully tailored to minimize the intrusion on protected freedoms. No such weighty governmental interests have been demonstrated to defend 47 U.S.C. sec. 399; asserted fears of undue governmental influence on broadcaster editorials and fears of partisan expression by broadcasters lack foundation. Moreover, considerably less intrusive measures are available to achieve the government's interests.

Argument.

I. SECTION 399 UNCONSTITUTIONALLY IMPOSES GOVERNMENTAL CENSORSHIP OF PRIVATE SPEECH.

By banning broadcaster editorializing, Section 399(a) censors private speech. The provision does not merely decline

governmental subsidy for broadcaster editorials; it actually forbids the use of nonfederal monies for such editorials once the broadcaster receives a federal grant. This incursion on First Amendment freedoms cannot be justified by government involvement in the creation and shape of public broadcasting. If First Amendment freedoms can be bypassed on the basis of such governmental presence, few First Amendment rights, if any, would survive in the modern environment of pervasive governmental interaction with the private sector.

A. *Section 399 Censors Privately Financed,
Private Speech.*

Public broadcasting in this country is neither federally owned nor federally operated, as it is in some countries. Instead, noncommercial, educational broadcasting stations are owned and operated by private nonprofit organizations, such as Appellee Pacifica Foundation; private colleges and universities; public colleges and universities; local school boards, and state and municipal broadcasting authorities. By forbidding editorializing by any noncommercial educational broadcaster receiving a federal grant from the Corporation for Public Broadcasting, Section 399 silences the views of private and nonfederal licensees, like the Pacifica Foundation, and precludes the use of private and nonfederal funds to produce and broadcast such editorial views. Section 399 does not simply place conditions on the use of federal funds; it uses the presence of federal funds to inject governmental control over the recipient broadcaster's ability to editorialize, using any other funds. Thus, Section 399 forces noncommercial broadcasters to forego non-federally financed editorial expression once their stations receive federal grants, no matter how small, for other purposes.

The editorial expression censored by Section 399 lies at the heart of First Amendment. As this Court has repeatedly de-

clared, the First Amendment most centrally affirms the democratic commitment to free and open debate over public issues and policies. *NAACP v. Claiborn Hardware, Co.*, 102 S.Ct. 3409, 3423 (1982); *First National Bank of Boston v. Bellotti*, 435 U.S. 735, 783 (1978); *Mills v. Alabama*, 384 U.S. 214, 218-219 (1966); *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) ("central meaning of the First Amendment" is a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open"); *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) ("The first amendment affords the broadest protection to political expression"). Section 399 silences editorials — the expressed views of the editor. Congress has thus prevented public broadcasting stations from fulfilling their role as "private journalists," consistent with their trusteeship over the airwaves, *Columbia Broadcasting System v. Democratic Nat'l Comm.*, 412 U.S. 94, 110-111 (1973), and Congress has deprived the audience of the expression about public affairs that the audience has a right to receive. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). This outright curtailment of expression is not mitigated by the continued rights of others besides the broadcaster to express their views over the air.² Indeed, as this Court has declared, "serious First Amendment issues" would be raised if a broadcaster is refused to permit "to carry a particular program or to publish his own views." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 396 (1969) (emphasis added).

² The broadcaster receiving federal funds may air the views of others, labeling those views as editorials and making rebuttal time available, consistent with the Fairness Doctrine, see 47 U.S.C. sec. 315(a), so long as the broadcaster assures that "the surrounding facts and circumstances of any such aired views do not indicate that such views are represented or intended as the official opinion of the licensee or its management." *In re Complaint of Accuracy in Media, Inc.*, 45 F.C.C. 2d 297, 302 (1973).

Such serious First Amendment issues are raised by Section 399, despite the Government's effort to characterize this governmentally induced waiver of constitutionally protected speech merely a Congressional "determin[ation] that it will not subsidize editorializing." Brief for the United States, *FCC v. League of Women Voters of California*, at 42. Section 399 is not a refusal to subsidize noncommercial broadcaster editorializing; it is a refusal to permit it.³

Section 399 conditions federal funds not simply on restrictions as to their usage, but on the broadcaster's waiver of constitutionally protected expression, financed by other sources. Thus, Section 399 abrogates the rule that the government may not use its powers to grant or withhold benefits to infringe on fundamental freedoms. *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968); *Speiser v. Randall*, 357 U.S. 513, 518 (1958); *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 593-594 (1926). Even where the government may deny a benefit, it may not do so because of an impermissible reason, such as a desire to suppress disfavored speech. See *Perry v. Sindermann*, 407 U.S. 593, 597 (1972). Nor may the government use its power to grant a benefit to deprive private parties of their constitutional rights. *Speiser v. Randall*, 357 U.S. 513, 518 (1948). And yet Section 399 seeks to deploy the federal grants process to deprive noncommercial broadcasters of their protected freedom to express views on public issues; the provision is not merely a governmental refusal to subsidize that expression.

³ The government is not entirely free to refuse to subsidize the exercise of private rights; where that refusal effectively denies those rights, constitutional protections may well arise. *Regan v. Taxation With Representation*, 51 U.S.L.W. 4583, 4587 (1983) (Blackmun, J. concurring) (Congress may decline to accord tax-exempt status for organization that lobbies but may not preclude alternate channels for that protected First Amendment activity).

Even for noncommercial broadcasters having associations with local or state governments — broadcasters like public universities, municipal authorities, or school boards — Section 399 amounts to a greater governmental denial than a mere refusal to subsidize broadcaster editorials. Instead, Section 399 prevents these broadcasters from editorializing with the use of nonfederal funds, once the broadcasters accept a federal grant from the Corporation for Public Broadcasting. Through Section 399, the federal government has leveraged its financial contribution to public broadcasting, however small a fraction of the broadcaster's budget, into control over that entire budget. Private monies and state and local monies alike are restricted from editorial use by the broadcaster receiving a federal grant. Private editorial speech and public — but non-federal — editorial views alike are affirmatively denied airtime and denied to the audience. Section 399 is not merely a refusal by the government to remove obstacles "not of its own creation;" the provision "place[s] obstacles in the path" of broadcasters' freedom of speech. *Harris v. McRae*, 448 U.S. 297, 316 (1980). See also *Regan v. Taxation with Representation*, 51 U.S.L.W. 4583, 4586 (1983).

Only noncommercial broadcasters can be blocked by this obstacle. Commercial broadcasters retain the right to editorialize, as do editors of newspapers and magazines. Thus, non-commercial broadcasters as a group of speakers are selectively denied the right to address audiences on "public issues." *In re Complaint of Accuracy in Media, Inc.*, 45 F.C.C.2d 297, 302 (1973). Such differential treatment of expressive media burdens the First Amendment. *Minneapolis Star & Tribune Co. v. Minnesota Comm'ner of Revenue*, 51 U.S.L.W. 4315, 4317-4318 (March 29, 1983) (in this respect, Section 399, as a regulation "curtail[ing] expression of a particular point of view on controversial issues of general interest is the purest example of a 'law abridging the freedom of speech, or of the

press.' A regulation that denies one group of persons the right to address a selected audience on 'controversial issues of public policy' is plainly such a regulation.'" *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 529, 2338 (1980) (Stevens, J., concurring).⁴

If the Congressional goal were simply to avoid subsidizing the editorial speech of broadcasters, far less intrusive means are available. Separate accounting for the federal and non-federal funds is already a technique routinely used to secure legitimate government purposes elsewhere, consistent with Constitutional guarantees. See *infra* at 31. Section 399 in contrast extends the thumb of governmental support onto the entire broadcast activities of public stations receiving a federal grant, and at minimum violates the constitutional prohibition against overbroad restrictions on fundamental freedoms.

*B. The Incursion on First Amendment Rights Cannot
be Justified by the Government's Role in
Public Broadcasting.*

The Government argues that the public nature of public broadcasting involves a commitment to a form of public broadcasting that justifies the Congressional ban on broadcaster editorializing. Brief for the United States, *FCC v. League of Women Voters of California*, No. 82-912, at 6-7, 9-22, 33-34. Thus, the government claims that public broadcasting is "the product of a national commitment, financed by government," Brief for the United States at 6, and the kind of public broadcasting the Government wants does not include

⁴The differential treatment of noncommercial and commercial broadcasters in this regard also may present a violation of the guarantee of Equal Protection. See *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972); *Fowler v. Rhode Island*, 345 U.S. 67 (1945). See generally Karst, *Equality as a Central Principle in the First Amendment*, 43 U. Chi. L. Rev. 20 (1975).

broadcaster editorials. This argument mistakes both the actual nature of the public broadcasting endorsed by Congress and the scope of Congressional power in this area.

First, the kind of public broadcasting endorsed by the Congress is nonfederal, decentralized, and directed by the expressive freedoms and creative judgments of private groups and local and state agencies. Congress sought to promote the educational and cultural uses of broadcasting, with maximum freedom from interference regarding program content. See 47 U.S.C. sec. 396(a)(7) (1970). Congress specifically rejected public broadcasting premised on federal management and ownership. Rather than producing a public broadcasting system to its own specifications, Congress approved decentralized control, with private and nonfederal ownership. *Public Broadcasting Act of 1967*, Pub.L. No. 92-129, 47 U.S.C. (& Supp. V) sec. 390 et seq. See also 47 U.S.C.A. sec. 396(k)(9)(B) (role of community advisory board).

Indeed, Congress so wanted to shield noncommercial public broadcasting from the demands of even a beneficent federal government that it created the nonprofit, government-chartered Corporation for Public Broadcasting to insulate stations from government pressure while channeling federal funds to those stations. 47 U.S.C. (& Supp. V) 396 (b-g). Declaring that diversity in programming depends on "freedom, imagination, and initiative," Congress directed the Corporation for Public Broadcasting to "afford maximum protection from extraneous interference and control." 47 U.S.C.A. sec. 396(a)(1), (3) (7) (West Supp. 1979). Entrusted with raising and disbursing funds and encouraging the creation of new non-commercial stations, the Corporation is itself prohibited from owning or operating a public telecommunications system, and from producing or distributing programs. 47 U.S.C.A. sec. 396(b), (c) (1), (g) (3) (West Supp. 1979). Most of the programming is to be developed by local stations. The conception

of public broadcasting adopted by Congress, then, is a conception of private and nonfederal initiative freed from the fetters of commercial pressures, and assisted by the federal government but shielded from its control.

Accordingly, Section 399 cannot be defended on the possibility that Congress could have created a federally owned and operated broadcasting network like Britain's BBC.⁵ It is just this possibility that Congress rejected. Moreover, the particular conception of public broadcasting chosen by Congress preserved private and decentralized initiative and freedom, a conception incompatible with federal prescriptions about what kinds of expression can be aired.

Moreover, the Government's assumption that Congress may avoid First Amendment restrictions by asserting governmental involvement in the design and regulation of a broadcast system is patently refutable by the example of commercial broadcasting. There too Congress governs and supervises the allocation of the airwaves; there too the federal government grants and revokes licenses; there too the Government is inextricably involved with private broadcast activities; and indeed, there too the Government has provided enormous economic subsidy through its provision of valuable licenses for the exclusive use of the public air waves. See generally 47 U.S.C. sec. 301, 315(a) (FCC licensing and equal time rules). But the First Amendment remains a vital and powerful limit on what the federal government may regulate in the commercial broadcast setting, and the same must be true with public broadcasting. *Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973); *Red Lion Broadcasting Co. v.*

⁵ Nor is it clear that either a federally owned and operated broadcast network would survive First Amendment scrutiny. See *Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 149-150 (1973) (Douglas, J., concurring) (even if Public Broadcasting were considered a governmental agency, First Amendment strictures would apply). Certainly this issue is not presented to the Court here.

FCC, 395 U.S. 367, 390 (1969); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948). Just as the regulatory necessity of scarcity cannot be used to silence private First Amendment rights of commercial broadcasters, governmental involvement in public broadcasting cannot be used to bypass First Amendment constraints. The degree of governmental involvement in public broadcasting can no more justify governmental censorship of public broadcaster views than governmental involvement in private broadcasting can justify censorship of private broadcaster views. Nor may governmental restriction on protected expression by private parties be upheld simply because of "the special interests of a government in overseeing the use of its property." *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 540 (1980).

C. If Federal Grants Can Carry Strings Controlling the Use of Nonfederal Funds, as in Section 399, No First Amendment Freedoms Can Survive the Modern Regulatory Environment.

If Section 399's prohibition of public broadcaster editorializing is Constitutional because of "[p]ublic broadcasting's entanglements with and dependence on government," Brief for the United States, at 18, there will be no limit to similar curtailments of fundamental freedoms in the modern social environment of private individuals' and organizations' entanglements and dependence on government.

It has been nearly twenty years since the classic Yale Law Journal article demonstrated the dependence of all Americans on varied forms of governmental support and benefits. *Reich, The New Property*, 73 Yale L. J. 733 (1964). Since that time, the pervasiveness of governmental involvement in productive activity and daily life has only increased, and the typical American's life is enmeshed with government services and assistance.

Just in the area of housing, Federal Mortgage Insurance, 12 U.S.C.A. sec. 1709, federal home improvements loans, 12 U.S.C.A. sec. 1715K, the Emergency Homeowners' Relief Fund, 12 U.S.C.A. sec. 2701 et seq., and the Urban Homesteading Program 12 U.S.C.A. sec. 1706e provide security and enable individuals and families to find and maintain their homes. Federal regulation of banks protects bank mortgages as well as individual savings. See 12 U.S.C.A. sec. 1811, et seq. Millions of people rely on each of these programs or depend on federal rent supplements for low-income families, 12 U.S.C.A. sec. 1701s, and federally-subsidized public housing, 12 U.S.C.A. sec. 1701x.

Similarly, health, nutrition, and personal income in this country now involve so much governmental support that no individual is independent of federal assistance of some kind. There are the well-known assistance programs, like Medicaid and Medicare, 42 U.S.C.A. sec. 1395, Food Stamps, 7 U.S.C.A. sec. 2011 et seq., Aid to Families with Dependent Children, 42 U.S.C.A. sec. 601 et seq.; School Lunch and School Breakfast Programs, 42 U.S.C.A. sec. 1751, et seq.; and Supplemental Social Security Income, 42 U.S.C.A. sec. 1382. But government entanglement in food and medical care is even more penetrating, given Federal regulation under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C.A. sec. 301, et seq., federally-supported nutrition research, 7 U.S.C.A. sec. 361a-c; 427, 427i, tax subsidies for personal medical expenses, 26 U.S.C.A. sec. 104, 105, 213, and preventive health services programs, 42 U.S.C.A. sec. 247. Federal involvement in basic income supports span Social Security, 42 U.S.C.A. 301 et seq., government pensions, and federally regulated private pensions, under the Employee Retirement Income Security Act, 29 U.S.C.A. sec. 1001.

Federal regulation and assistance to private industry takes the form of tax subsidies, direct loans, and loan guarantees.

Executive Office of the President, Office of Management and Budget, Budget of the United States Government, Fiscal Year 1984, 5-2 to 5-6, 6-16 to 6-20. The 1984 estimates of federal assistance for commerce and housing through the tax structure is \$115.6 billion. *Id.* at 5-64. Many industries, like the oil industry, receive massive injections of government assistance, through such devices as the oil depletion allowance. See 26 U.S.C.A. sec. 613 (1982). The estimated value of this allowance to the oil industry in 1984 is \$3.0 billion. Surely no effort has been made to curtail the speech of these commercial enterprises given the extent and entanglement of government support. Indeed, private commercial speech has been bolstered by Constitutional protection in recent years, *First National Bank of Boston v. Bellotti*, 435 U.S. 756 (1978); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), and both the press and broadcast forums regularly include expressions by such companies as Mobil and Xerox.

Another area inextricably entwining governmental support and private activities is communications. Federal regulation of telephone services has recently occupied the attention of federal courts and Congress as well as the Federal Communications Commission. See *United States v. AT & T, Western Electric Co., Inc., and Bell Telephone Laboratories, Inc.*, Civ. No. 74-1698 (D.D.C. dismissed by stipulation Jan. 8, 1982); *Tannenbaum and Hurst, The AT&T Agreement: Reorganization of the Telecommunications Industry and Conflicts with Illinois Law*, 15 John Marshall L. Rev. 463 (1982). Public mail service remains a central form for private communication, see 39 U.S.C.A. sec. 101 et seq. The Federal government licenses broadcast services, 47 U.S.C.A. sec. 301, 309, and coordinates communication systems. 47 U.S.C.A. sec. 11, 154(o).

Still another area enmeshed with governmental assistance is education. Federal grants to improve basic skills training in

local schools, 20 U.S.C.A. sec. 2722, federally insured student loans for college and university students, 20 U.S.C.A. sec. 1071, basic educational opportunity grants, 20 U.S.C.A. sec. 1070, and federal grant support and tax subsidies for colleges and universities are essential to the educational opportunities for individual students and centrally important to the continued existence of these institutions for learning.

According to the Government's reasoning in this case, the fact of government involvement in each of these areas could supply a basis for waiving First Amendment and other fundamental freedoms even where private funds are used to exercise those freedoms. The dependency of individuals, groups, and institutions on federal assistance cannot be denied; the deep involvement of the government in structuring and maintaining health, education, communication, and income services is obvious. If the sheer presence of federal support or subsidy can supply the basis for curtailing individual freedoms, even if other financial sources are available to enable their exercise, then there is no corner of contemporary society in which individual freedom can withstand assault.

Until now, the courts have held careful check on the degree to which government support may carry strings that paralyze constitutional freedoms. In the academic context, even where the government is the employer, the free speech of teachers retains constitutional protection. *Pickering v. Board of Education*, 391 U.S. 563 (1968). The academic freedom of students also has remained protected even where the students depend upon government aid. *Haverford College v. Reeher*, 329 F. Supp. 1196 (E.D. Pa. 1977) (striking state statute requiring college to report student violations of campus rules for purpose of withdrawing state scholarship aid).⁶

⁶ Here the academic freedom hypothetical in the Government's brief if anything supports appellees. The Government concedes that "The govern-

The mere fact of governmental support cannot supply a basis for controlling individual freedom; only weighty state interests, carefully pursued, may be used to justify intrusion on such freedoms. See *Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. 589 (1967); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Meyer v. Nebraska*, 262 U.S. 390 (1923). The federal government has generally heretofore hewed this line in establishing controls for federal grants that essentially protect the rights of grant recipients while assuring accountable use of the federal funds. Stephen M. Barro, *Federal Education Goals and Policy Instruments*, in *Symposium on The Federal Interest in Financing Schooling*, at 229 (M. Timpane ed. 1978).

Similarly, federal involvement in communications services has never justified federal control to the exclusion of private freedoms. *Red Lion v. FCC*, 395 U.S. 367, 390 (1969) ("the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment [which are] to preserve an uninhibited marketplace of ideas . . . rather than to countenance monopolization of that

ment could not prohibit outside research by a college professor who received a small grant to conduct research in a particular area because, assuming that he properly performed the research called for in the grant, the government would not be financing his other work any more than it would be financing his private life." Brief for the United States, at 46-47, n.77. Public broadcasters receiving federal grants through the Corporation for Public Broadcasting similarly have other nonfederal sources to finance editorials and other broadcasting purposes. The Government erroneously claims that "if the government gave [the college professor] access to a federally financed laboratory for the purpose of doing the grant research, it could legitimately insist that he not use the facility for printing political propaganda pamphlets." *Id.* This Court has held to the contrary that even where the entire academic environment is sustained by government support, a teacher may not be forced to waive his or her expressive freedoms, *Pickering v. Board of Education*, 391 U.S. 563 (1968).

market, whether it be by the Government itself or a private licensee"); *Hannegan v. Esquire, Inc.*, 327 U.S. 145, 156 (1946) (second-class mail permit may not be conditioned upon grounds curtailing expression).

To conclude instead, as the Government urges in this case, that federal involvement through financial subsidy and regulation can justify control over private activities even where nonfederal support is also present, would leave no institution or person able to enjoy fundamental freedoms. The presence of the federal government in income subsidies and taxation, health insurance and services, housing subsidies, communication, education, and a host of other areas is so pervasive that no activity could be immune from the kind of intrusion deployed in Section 399. This has not been the heritage of our Constitution, nor can it be its destiny.

II. SECTION 399'S CENSORSHIP OF SPEECH LACKS SUBSTANTIAL OR IMPORTANT GOVERNMENTAL INTERESTS AND FAILS TO EMPLOY AVAILABLE LESS RESTRICTIVE MEANS.

Although the "unique and special problems" of broadcasting — the physical scarcity of broadcasting frequencies — have called for a different kind of Governmental involvement, and different First Amendment doctrine than other speech situations, *CBS, Inc. v. Democratic National Committee*, 412 U.S. 94, 101 (1973); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388 (1969), governmental infringements of speech in the broadcast context still must survive Constitutional careful scrutiny. Debates over whether this scrutiny should be deemed to require "compelling governmental interests" or other par-

ticular doctrinal phrases misses the point:⁷ the First Amendment in the broadcasting area stands "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government or a private licensee. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). Especially where the regulation restricts speech rather than promoting it, and where it singles out some speech for regulation, *Minneapolis Star & Tribune Co. v. Minn. Comm'ner of Revenue*, 103 S.Ct. 1365, 1370 (March 29, 1983), challenged governmental action must be justified by weighty interests and must be tailored to intrude no more than required to serve those interests. *Federal Communications Commission v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). Neither of these requirements is even approximated here.

A. *The Government Has Failed to Demonstrate
Weighty Interests Served by Section 399.*

The government's chief defense of Section 399 is that Congress does not want public broadcasters to editorialize. The

⁷ Cf. *Tilton v. Richardson*, 403 U.S. 672, 678 (1971) (Burger, C.J.) (plurality opinion) ("There are always risks in treating criteria discussed by the Court from time to time as "tests" in any limiting sense of that term. Constitutional adjudication does not lend itself to the absolutes of the physical sciences or mathematics. The standards should rather be viewed as guidelines with which to identify instances in which the objectives of the Religion Clauses have been impaired").

government simply asserts that the Congressional provision is necessary because the "public" nature of public broadcasting, as defined by Congress, could be interfered with by public broadcaster editorials. Brief for the United States, 33-35. As noted above, this claim of governmental interests depends on the fallacious argument that Congress can control public broadcasting because it is involved in its creation and maintenance. Surely an abridgement of the freedom of speech must be justified by more than a Congressional desire to control the nature of a major channel for expression and debate.

The government proffers two other interests to justify Section 399. First, it is supposed to protect the public from the use of taxpayer dollars or governmental support in the advancement of private "partisan" views, Brief for the United States, 34, 39, 42. Second, the provision is supposed to guard against undue government influence on the views expressed by broadcasters receiving or hoping to receive federal support.⁸ No evidence of prior abuses is offered to support these assertions.⁹

Instead, the government has provided mere speculations of harm, which cannot satisfy the constitutional scrutiny accorded to impingements on fundamental freedom. *United Mine Workers v. Illinois Bar Assoc.*, 389 U.S. 217, 222-223 (1967). Just as in *Buckley v. Valeo*, 424 U.S. 1, 93 n.126 (1976), the

⁸This asserted interest hardly justifies curtailment of noncommercial broadcaster editorializing on local issues, unrelated to federal support.

⁹Thus, Section 399 bears no resemblance to the Hatch Act provisions upheld in *U.S. Civil Service Commission v. National Ass'n of Letter Carriers*, 413 U.S. 548, 557 (1973). Long experience with and detailed investigation into the political corruption of the spoils system in public employment justified the creation of the civil service system and the Hatch Act to curtail the risks that political activity by government employees would expose both those employees and the government to improper political influence. No such experience with abuses is offered in the public broadcasting context; nor is the public broadcaster a government employee.

claim that public funding could lead to governmental control and contamination of political freedom is "wholly speculative."

Moreover, these two interests offered by the government are mutually incompatible. On the one hand, the government warns of the magnification of private views, with broadcasters using the stations "to propagate their own partisan ends." Brief for the United States, at 34. On the other hand, the government warns of government orthodoxy and propagandizing through the voices of broadcasters seeking to curry favor with the Government funding sources. Brief for United States at 35. The risk that the broadcaster will become a mouthpiece for the government hardly seems weighty when coupled with a prediction that the broadcaster will express controversial, partisan views that are opposed by the majority of taxpayers and the government officials in power. As the Government acknowledges, the public affairs programming of public broadcasting has already demonstrated controversial and provocative qualities, Brief for the United States, at 41, and yet no charge is made that taxpayers' monies are misused in these programs, or that the audience attribute to the government the views expressed on these programs. Further, the alleged risk of political influence on broadcasting due to government funding surely is no greater in editorial expression than it is in programming generally, as the legislative history of Section 399 itself suggests.¹⁰

¹⁰Thus, Representative Watson said "Let them go ahead and editorialize. Give me the right to control content and others can editorialize all they want to, but I will influence the thinking of the American public more with the programs or with people I have appearing in the programs. The American public knows editorials are subjective, but they believe regular programs are objective." 113 Cong. Rec. 26392 (1967). The House Report, describing the ban on broadcaster editorializing, conceded that the result would not be balanced, fair, and objective presentations of controversial issues by noncommercial stations. H.R. Rep. No. 572, 90th Cong., 1st Sess. (Aug. 31, 1967), at 20.

Above all, the viewing and listening public is alerted best to the media's lack of objectivity when a broadcast is labeled an editorial, and prohibiting this portion of the broadcast day hardly eliminates whatever risks of government influence accompany government funding."

The Government's fear that taxpayer dollars may be used to advance "partisan" views apparently comes from a conception that public broadcasting, unlike other areas for public debate, should exclude partisan debate. The purpose of public broadcasting is, if anything, quite the opposite. As an alternative to commercial broadcasting, noncommercial educational broadcasting enlarges the range of options for listeners and viewers. Rather than purchasing controversial private views, the taxpayer dollars conveyed to the noncommercial broadcaster help pay for the forum for the expression of all views. In a very real sense, it is the general public, not the broadcaster, who is benefited by Governmental assistance to noncommercial broadcasting, and by the broadcaster's vital participation in the marketplace of ideas. "[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *First National Bank v. Bellotti*, 435 U.S. 765, 783 (1978). See *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-757 (1976). Similarly, the fear that governmental support for public broadcasting requires curtailing the broadcaster's own rights of expressions misunderstands the First Amendment's "central meaning" which "is to secure 'the widest possible dissemination of information from diverse and antagonistic forces.'" *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (quoting *Assoc. Press, Inc. v. United States*, 326 U.S. 1, 20 (1945)). Points of view, efforts to persuade, partisan editorials are critical to the free expression protected by the First Amend-

ment; "[f]ree trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts." *Thomas v. Collins*, 323 U.S. 516, 537 (1945). See *First National Bank v. Bellotti*, 435 U.S. 765, 790 (1978). Unlike the Establishment Clause, which forbids the government not only from interfering with individual freedom of religion but also from favoring one religious view over any other, U.S. Const., Amend. I, government support of expression may be necessary to protect and preserve the freedoms of speech and of the press. *Hannegan v. Esquire, Inc.*, 327 U.S. 146 (1946). See also T. Emerson, *The System of Freedom of Expression* 627-630 (1970); Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 Colum. L. Rev. 609, 642 (1982).

The interests asserted by the Government may betray not only serious misunderstanding of the First Amendment, but also an inappropriate Governmental desire to shut off a key source of independent criticism and controversy. Noncommercial broadcasting, as Congress intended, is freed from the pressures of advertising sponsors and profit-making, and thus offers a specially unfettered avenue for broadcast expression. In this light, the Government's repeated assertion that the views of broadcasters may be partisan and controversial not only falls short of the requisite weight for sustaining curtailment of speech; it demonstrates the very impetus behind the First Amendment in protecting from Government control the expression of dissenting and antagonistic views.¹¹

¹¹ Similarly, the Congressional supporters of Section 399 revealed fears of criticism that may well indicate why the First Amendment so centrally protects the kind of editorial speech banned by Section 399. Congressman Jeol-son asserted that public officials were "sitting duck[s]" given media editorializing. 113 Cong. Rec. 26391 (1967). See generally Toohey, *Section 399: The Constitution Giveth and Congress Taketh Away*, 6 Educ. Broadcasting Rev. 31, 34 (1972) ("the purpose of Section 399 was clear: to prevent Con-

By seeking to silence "partisan" views on public issues, Section 399 offends the First Amendment's commitment to persuasive, political expression, and ignores this Court's declaration that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department v. Mosley*, 408 U.S. 92, 95 (1972). See *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 529 (1980); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

B. The Government Has Failed to Use Readily Available, Less Restrictive Means to Achieve its Ends.

Even if there were foundation for the Government's fears, there are measures less restrictive of free expression available to hold those fears in check. The audience could be protected from any confusion over whether editorials by noncommercial broadcasters are expressions of governmental views by a disclaimer to the contrary, accompanying each editorial, just as the permissible editorials carried by these stations currently disclaim identification with the broadcaster. The audience could similarly be guarded against any special advantage the broadcaster may have in access to the airwaves by effective enforcement of the Fairness Doctrine, 47 U.S.C. sec. 315(a) (1976), which requires the offer of air time to individuals personally attacked or editorially opposed by the station, 47 C.F.R. secs. 73.1910, 73.1920, 73.1930 (1982), and also requires adequate discussion of conflicting views on controversial subjects, 47 U.S.C. sec. 315(a) (1976).

gress from creating a monster that might someday turn on its creator. Therefore, to achieve its own self-protective ends Congress simply legislated away a significant part of educational broadcasters' right of free speech").

In addition, to guard against the use of taxpayers monies to finance the expression of "partisan" broadcaster views, Congress could require the broadcasters to segregate federal and nonfederal funds and provide separate accountings or assurances of separate uses for these funds. This technique is already effectively used to protect against governmental infringement of First Amendment freedoms, most notably in preserving freedom from Governmental establishment of religion. See *Tilton v. Richardson*, 403 U.S. 672 (1971); *Roemer v. Board of Public Works*, 426 U.S. 736 (1976); *Everson v. Board of Education*, 330 U.S. 1 (1947).

Each of these measures would accomplish the Governmental goals with less restrictions of freedom of expression than the flat curtailment of broadcaster editorializing embodied in Section 399. Effective use of safeguards already in place could also achieve the government's ends without banning broadcaster editorializing. In addition to the Fairness Doctrine, Congress has already structured the governance of public broadcasting to protect against both the risk of irresponsible uses of government funds and the risk of political influence on the expression by recipients of governmental grants. Congress established the Corporation for Public Broadcasting to insulate recipient broadcasters from government influence, 47 U.S.C. sec. 396(a)(1), (7) (West Supp. 1982); H.R. Rep. No. 572, 90th Cong., 1st Sess. 19-20 (1967), reprinted in [1967] U.S. Code Cong. & Ad. News 1799, 1810. Congress also guarded against even the appearance of Governmental orthodoxy as an influence in the grant process by requiring variety in political affiliations for the Board of Directors of the Corporation for Public Broadcasting: no more than eight of the fifteen directors may be members of the same political party, 47 U.S.C.A. sec. 396(c)(1) (West Supp. 1979). The Corporation's own practices require use of objective standards for awarding grants in order to avoid intruding

upon the content of broadcast expression. See 47 U.S.C. sec. 396(g)(1)(A). The Corporation has also established a semi-autonomous Program Fund to better insulate individual programming decisions from the directors. Broadcasting (June 25, 1979), at 54.

Finally, the best measure for curing fears of misleading or controversial speech is more speech and robust debate. "Falsehoods and fallacies must be exposed, not suppressed. . . . That is the command of the First Amendment." *American Communications Ass'n v. Douds*, 339 U.S. 382, 396 (1950). See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Counsel, Inc.*, 425 U.S. 748, 770 (1976) (choice between "the dangers of suppressing information and the dangers of its misuse if it is freely available [is a choice] that the First Amendment makes for us"). The solution to the fear of governmental influence on the broadcaster editorials is to ensure greater access for alternative points of view; similarly an answer to fears of excessive editorial power by broadcasters would be increased opportunities of access for other speakers. Increased access to airtime on public broadcasting, thus, would be a method to meet the asserted governmental interests behind Section 399 consistent with the First Amendment.¹²

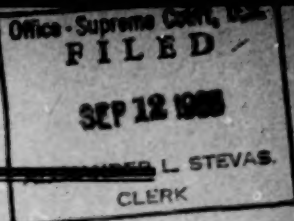
¹²"The ultimate danger is not that the government's point of view gets across; it is that the views of others do not, and 'the remedy of silence is not the way of the first amendment.'" Canby, *The First Amendment and the State as Editor: Implications for Public Broadcasting*, 52 Tex. L. Rev. 1123, 1127 (1974) (quoting Van Alstyne, *The First Amendment and the Suppression of Warmongering Propaganda in the United States*, 31 Law & Contemp. Prob. 530, 535 (1966)).

Conclusion.

For the foregoing reasons, the judgment of the lower court should be affirmed.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

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v. *Appellant,*

LEAGUE OF WOMEN VOTERS OF CALIFORNIA, *et al.,*
Appellees.

On Appeal from the United States District Court
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**BRIEF FOR AMICI CURIAE
CBS INC.**

**NATIONAL ASSOCIATION OF BROADCASTERS
RADIO TELEVISION NEWS DIRECTORS ASSOCIATION
IN SUPPORT OF APPELLEES LEAGUE OF WOMEN
VOTERS OF CALIFORNIA ET AL**

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BRIEF FOR AMICI CURIAE
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NATIONAL ASSOCIATION OF BROADCASTERS
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IN SUPPORT OF APPELLEES LEAGUE OF WOMEN
VOTERS OF CALIFORNIA ET AL.

INTEREST OF AMICI CURIAE

CBS Inc. ("CBS") is the owner of radio and television broadcasting stations. These stations regularly convey information and provoke debate on matters of public importance through the exercise of their First Amendment right to editorialize.¹ The National Association of Broadcasters ("NAB") is a nonprofit incorporated association of radio and television broadcast stations and networks. As of September 7, 1983, NAB's membership included 4,442 radio stations, 701 television stations, and the major nationwide commercial broadcast networks. The Radio-Television News Directors Association includes approximately 2,000 news directors and others who are ac-

¹ CBS also operates national radio and television networks which do not regularly editorialize. Neither these networks nor corporate management plays any role in the formulation of station editorials, leaving that important function to the local management of CBS' individual stations.

tive in the supervision, reporting and editing of news and public affairs programming on radio and television, both broadcast and cable.

Amici believe that the right of television and radio stations to editorialize on controversial issues of public importance is a vital journalistic function essential to the healthy functioning of a free press in a democratic society. The interests of amici would be directly affected by any decision that the Government could constitutionally suppress broadcast editorializing. The arguments made by the Government in this case strongly suggest that the Government believes it could prohibit the right of commercial and noncommercial stations alike to editorialize or to otherwise express their views on issues of public interest. Allowing the Government to suppress such controversial speech would deprive the public of an important source of information and would seriously undermine the First Amendment.

SUMMARY OF ARGUMENT

Whether or not motivated by a desire to restrain critical speech, government suppression of controversial speech by public broadcasters violates the First Amendment. The special characteristics of broadcasting do not support this ban; this Court has repeatedly made clear that the suppression of controversial broadcast speech cannot be justified under the First Amendment.

Nor can the Spending Power be employed to violate the First Amendment freedoms of public broadcasters to spend nonfederal funds on editorializing. Like commercial broadcasters, public broadcasters were established as independent journalistic enterprises free from Government control. The Government has advanced no compelling interest that would permit this extraordinary attempt at governmental suppression of controversial speech, and these restrictions cannot be justified as designed to prevent speech by state entities, to prevent government subsidization of "unpopular" speech or to protect public broadcasters from government efforts to influence editorial content.

ARGUMENT

I. EDITORIALIZING MAKES A VITAL CONTRIBUTION TO THE MARKETPLACE OF IDEAS, AND PROTECTION OF THE RIGHT TO EDITORIALIZE IS ESSENTIAL TO A FREE PRESS

Protection for the expression of opinion is central to the First Amendment. Since this Nation's earliest days, both formal editorializing and less formal expression of editorial opinion have played a critical role in informing the public. They have affected the course of our history by igniting public concern and stimulating public debate on matters of public interest. The editorials of any period have reflected the pulse of the Nation; "they reflect the incidents, causes, and struggles in American life."²

Editorials perform a variety of functions. Some are designed largely to inform and educate; others to intrigue and provoke; others to uncover societal injustices or governmental corruption; and yet others simply to entertain the audience.³ The editorial "is like the period at the end of the sentence; it provides a finality and an additional meaning to what has been said before."⁴

Government—including Congress, the President, the bureaucracy, and this Court—is frequently a target of criticism in some of the most influential editorials.⁵ The editorial is thus often the ideal format for speech designed "to invite dispute," "to provok[e] and challeng[e]," and to "strike at prejudices and preconceptions and [to] have profound and unsettling effects as it presses for accept-

² W. Sloan, *Pulitzer Prize Editorials* (inside cover) (1980) [hereinafter cited as *Pulitzer Editorials*].

³ E. Routt, *Dimensions of Broadcast Editorializing* 86 (1970) [hereinafter cited as *Broadcast Editorializing*].

⁴ Linn, *Introduction to Broadcast Editorializing* at 9. See also J. Hulteng, *The Opinion Function* 12-13 (1973).

⁵ *Broadcast Editorializing* at 86-196. The legislative history of Section 399 indicates that fear of this criticism was a motivating factor in the passage of Section 399. See pp. 28-29 *infra*.

ance of an idea." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). As such editorial speech is a vital part of our "profound national commitment . . . that debate on public issues should be uninhibited, robust, and wide-open." *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

The expression of editorial opinion has greatly influenced the course of public affairs. The forerunners to the modern editorial were the newsletter, the pamphlet and the old news ballad.⁶ Each of these played an influential role in the colonial period and post-American Revolution era. Early "editorial" writers during this period included Benjamin Franklin, John Adams, John Dickinson, Thomas Paine, and John Peter Zenger. British attempts to suppress the published opinions of Zenger and others played a large part in the adoption of the First Amendment.⁷ By the end of the Nineteenth Century the editorial had become commonplace in American newspapers.⁸ Numerous editorials have had a major impact on our history, influencing the election of Presidents,⁹ the mobilization of popular support for the American role in World War I and World War II,¹⁰ and the mobilization of popular opinion against racial injustice.¹¹ Broadcast edi-

⁶ News ballads were songs interpreting current events. They had a significant effect on the early American populace. J. Hart, *Views on the News: The Developing Editorial Syndrome 1500-1800*, at 198 (1970).

⁷ L. Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American History* 128-33 (1960).

⁸ J. Hart, *supra*, at 203.

⁹ An editorial by William Allan White in the *Emporia (Kansas) Gazette* "is given considerable credit in the election of William McKinley as President of the United States." *Broadcast Editorializing* at 77.

¹⁰ *Pulitzer Editorials* at 7, 59.

¹¹ Grover Cleveland Hall's series of anti-Klan editorials in the *Montgomery Adviser* during the 1920's are good examples of the influence editorials can have on public affairs. "As a consequence of Hall's campaign, victims of floggings, too frightened before, talked to law officers and journalists, numerous Klansmen were

torials have also made vital contributions to the marketplace of ideas.¹² Recognizing these contributions, the FCC has long encouraged licensees to editorialize.¹³

convicted, and the number of floggings in Alabama declined dramatically." *Id.* at 31. Governor Harry Byrd of Virginia reported that the editorials in the *Virginia-Pilot* "had more to do than any other single outside urging in convincing me that I should make one of my major recommendations the passage of a drastic anti-lynching law providing that lynching be a specific state offense." *Id.* at 33. These and later editorials on the same subjects "sparked national interest in [anti-lynching] law[s]." *Id.*

¹² *Broadcast Editorializing* at 112-20, 125-30; *Hearings on Broadcast Editorializing Practices Before Subcomm. of the House Comm. on Interstate and Foreign Commerce*, 88th Cong., 1st Sess. 296 (1963) [hereinafter cited as *Hearings on Broadcast Editorializing*].

As Americans rely more and more upon television and radio as their primary source of information, the role of editorial speech by broadcasters takes on increasing importance.

[Broadcasting is] a vital part of our system of communication. The electronic media have swiftly become a major factor in the dissemination of ideas and information To a large extent they share with the printed media the role of keeping people informed.

CBS v. DNC, 412 U.S. 94, 116 (1973) (opinion of Burger, C.J.). See also *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968); Kalven, *Broadcasting, Public Policy and the First Amendment*, 10 J.L. & Econ. 15, 16 (1967).

¹³ See *In re Editorializing by Broadcast Licensees*, 13 F.C.C. 1246 (1949); *Programming Inquiry*, 44 F.C.C. 2303, 2314 (1960); *Hearings on Broadcast Editorializing* at 87 (statement of Chairman E. William Henry on behalf of the FCC); *WHDH, Inc.*, 16 F.C.C.2d 1, 10, 12-13 (1969); *RKO General, Inc.*, 44 F.C.C.2d 149, 219 (1969); *Miners Broadcasting Services, Inc.*, 20 F.C.C.2d 1061 (1970).

In *Mayflower Broadcasting Corp.*, 8 F.C.C. 333, 339-41 (1940), the FCC suggested that editorializing by commercial and noncommercial broadcasters might be impermissible. The so-called *Mayflower* doctrine generated substantial criticism in its time and the FCC clearly repudiated such a policy in *In re Editorializing by Broadcast Licensees*, 13 F.C.C. 1246 (1949). See, e.g., *Hearings on Broadcast Editorializing* at 151 (statement of Commissioner Ford) ("Commission's decision in the *Mayflower* case was roundly criticized by Congress."); *Hearings on S-1333 Before Subcomm. of*

II. GOVERNMENT SUPPRESSION OF CONTROVERSIAL SPEECH IS PRESUMPTIVELY UNCONSTITUTIONAL

Difficult First Amendment questions may arise where government action indirectly impinges on the rights of free speech or press. However, the statute involved here presents no such difficult questions. It was avowedly designed to suppress a critical category of speech that makes a central contribution to the marketplace of ideas.

The First Amendment, having been "designed to prevent the Government from suppressing information,"¹⁴ does not tolerate such interdiction of speech on controversial issues. Time and time again this Court has invalidated governmental efforts at suppression despite the creative justifications that have been advanced. *E.g.*, *United States v. Grace*, 103 S. Ct. 1702 (1983) (prohibition of displays of banners on Supreme Court grounds in order to protect order and decorum at the Court); *Bolger v. Youngs Drug Products Corp.*, 103 S. Ct. 2875 (1983) (prohibition of mailing unsolicited contraceptive advertisements); *Brown v. Hartlage*, 456 U.S. 45 (1982) (prohibition of candidate's promise to lower his salary if elected); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) (plurality opinion) (prohibition of billboard advertising); *Schad v. Mount Ephraim*, 452 U.S. 61 (1981) (prohibition of all live entertainment as a zoning restriction); *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530 (1980) (prohibition of controversial speech in utility bill inserts); *Carey v. Brown*, 447 U.S. 455 (1980) (prohibition of picketing in residential neighborhoods in order to protect privacy); *Village of Schaumburg v. Citizens for a Better Environ-*

Comm. on Interstate and Foreign Commerce, 80th Cong., 1st Sess. 110-12 (1947) (statement of Justin Miller); L. White, *The American Radio* 176-78 (1947); Note, *The Mayflower Doctrine Scuttled*, 59 Yale L.J. 759 (1950); Lawrence, *Question of Editorial Opinions on Radio*, N.Y. Sun, Mar. 3, 1948, at 29, col. 1.

¹⁴ *Bolger v. Youngs Drug Products Corp.*, 103 S. Ct. 2875, 2887 (1983) (Rehnquist, J., concurring in the judgment).

ment, 444 U.S. 620 (1980) (prohibition of solicitation by charities devoting more than 25% of revenue to overhead); *First National Bank v. Bellotti*, 435 U.S. 765 (1978) (prohibition of corporate speech in order to prevent undue influence); *Landmark Communications v. Virginia*, 435 U.S. 829 (1978) (prohibition of speech about confidential judicial misconduct proceedings); *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977) (prohibition of "for sale signs" in order to halt white flight); *City of Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976) (prohibition of teachers' speaking at school board meetings); *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976) (prohibition of newspaper coverage of murder in order to preserve right to fair trial); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (prohibition of commercial speech about drug prices in order to maintain high standards for pharmacies); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (prohibition on drive-in movies containing nudity in order to protect passersby); *Police Department v. Mosley*, 408 U.S. 92 (1972) (prohibition of picketing to protest employment discrimination in order to prevent disruption of nearby school); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) (prohibition of leafletting in residential neighborhood in order to protect privacy); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (prohibition of advocacy of doctrines of violence in order to minimize likelihood of violent assemblies); *Tinker v. Des Moines School District*, 393 U.S. 503 (1969) (prohibition of wearing of arm-bands in order to avoid disruption of school environment); *Tally v. California*, 382 U.S. 60 (1960) (prohibition of anonymous handbills in order to be able to identify those responsible for fraud, false advertising or libel); *Terminiello v. Chicago*, 337 U.S. 1 (1949) (prohibition of race-baiting speech in order to prevent breach of peace); *Martin v. Struthers*, 319 U.S. 141 (1943) (prohibition of door-to-door distribution of circulars in order to protect privacy in one's home); *Thornhill v.*

Alabama, 310 U.S. 88 (1940) (prohibition of picketing in order to avoid breach of peace or disruption of industrial relations); *Schneider v. State*, 308 U.S. 147 (1939) (prohibition of leafletting in order to reduce litter); *Stromberg v. California*, 283 U.S. 359 (1931) (prohibition of display of red flag in order to suppress the spread of communism or anarchy).

Despite allegations of compelling justification this Court has invalidated a governmental prohibition of editorializing. In *Mills v. Alabama*, 384 U.S. 214 (1966), an Alabama statute was construed to prohibit the publication of political editorials on election day. A newspaper editor was charged with publishing an election day editorial in favor of changing Birmingham's form of government. The statutory prohibition was said to be necessary to protect the public from confusing last-minute charges that could not be answered before the election. *Id.* at 219-20. Nonetheless, the Court held that, "[i]t is difficult to conceive of a more obvious and flagrant abridgment of constitutionally guaranteed freedom of the press." *Id.* at 219. For,

[s]uppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change . . . muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free.

Id. Following *Mills*, the Court has reaffirmed "unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial." *Pittsburgh Press Co. v. Human Relations Commission*, 413 U.S. 376, 391 (1973). And just recently in *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530 (1980), this Court struck down a statute that barred utility companies from expressing "their opinions or viewpoints on controversial issues of public policy" in utility bill inserts. *Id.* at 533-34.

In light of these decisions, government suppression of editorials—whatever the justification—cannot survive un-

der the First Amendment. Nor is this any less true in the broadcast medium. While the Government urges that the "special characteristics of broadcasting"¹⁵ somehow support the statutory prohibition, here, as the District Court found, the Government has identified no characteristic of the broadcast medium that supports such suppression. 547 F. Supp. at 384. Indeed, the very alleged "scarcity" of broadcast frequencies strongly suggests both the unwisdom and unconstitutionality of suppressing editorial speech on the limited number of frequencies that are available.¹⁶

This Court's decisions hardly support the Government's position. To be sure this Court in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), held that it was constitutional for the FCC to require broadcasters who present political editorials and other speech on controversial issues of public importance to present opposing views—a requirement subsequently held invalid as to the print press.¹⁷ But it did so based on the express findings that there was no direct restraint on speech and that any indirect effect—which "would indeed be a serious matter"—was "at best speculative." *Id.* at 393. As the Court stressed

¹⁵ Brief for the United States at 28-32 [hereinafter cited as "Brief"].

¹⁶ Moreover, numerous recent studies indicate that there is substantial reason to question the Government's premise as to the continued scarcity of broadcast frequencies. See, e.g., Staff of Senate Comm. on Commerce, Science and Transportation, 98th Cong., 1st Sess., *Print and Electronic Media: The Case for First Amendment Parity* 2, 54, 56-83 (1983) (Senate Print No. 98-50); FCC Legislative Recommendations to Congress for Revision of the Communications Act, F.C.C. Report No. 608 (1981); Office of Plans and Policy, Federal Communications Commission, *Measurement of Concentration in Home Video Markets* 90-97 (Dec. 1982); Stern, Krasnow & Senkowski, *The New Video Marketplace and the Search for a Coherent Regulatory Philosophy*, 32 Cath. U. L. Rev. 529, 562-66 (1983); Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 Tex. L. Rev. 207, 221-26 (1982).

¹⁷ *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 257 (1974).

There is no question here of the Commission's refusal to permit the broadcaster to carry a particular program or to publish his own views Such questions would raise more serious First Amendment issues.

Id. at 396. Moreover, the decision in *Red Lion*, in sustaining the requirement of the fairness doctrine that broadcasters discuss controversial issues, made clear that in broadcasting the First Amendment is best served by encouraging, rather than suppressing, controversial speech. *Id.* at 389-90, 392, 394.

The two other cases permitting Congress and the FCC to regulate broadcast programming, *CBS, Inc. v. FCC*, 453 U.S. 367 (1981); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), likewise provide no justification for the suppression of editorializing.¹⁸

The limited access requirement upheld in *CBS, Inc. v. FCC* was held not to suppress broadcaster speech. The Court emphasized that "the statute does not impair the discretion of broadcasters to present their views on any issue." 453 U.S. at 397. And the statute provided only a limited right of access to the media for certain federal candidates. As the Court noted, "it has never approved a general right of access to the media." *Id.* at 396. In *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94 (1973), the Court refused to recognize a general right of access for editorial advertising because it would unacceptably run "the risk of an enlargement of Government control over the content of broadcast discussion of public issues." *Id.* at 127.¹⁹

¹⁸ See also *FCC v. National Citizens Comm'n for Broadcasting*, 436 U.S. 775, 801 (1978) (upholding restrictions on cross-ownership of newspapers and broadcast licenses which would not in any way "limit the flow of information").

¹⁹ "The broadcasting industry is entitled under the First Amendment to exercise 'the widest journalistic freedom consistent with its public [duties].'" *CBS, Inc. v. FCC*, 453 U.S. at 395. (quoting *CBS v. DNC*, 412 U.S. at 110).

The only case in which the Court has even suggested that suppression of broadcaster speech would be permissible was *FCC v. Pacifica Foundation*. But that case upheld only the FCC's limited regulation of the broadcast of indecent material because of concern that "[p]atently offensive, indecent material" would be "accessible to children, even those too young to read." 438 U.S. at 748-49. The Court thought it necessary "to emphasize the narrowness of [its] holding" (*id.* at 750). Stressing that the FCC had only "channelled" indecent speech away from early afternoon hours when children were listening (*id.* at 731, 750), it noted that the FCC did not "un- equivocally close[] . . . broadcasting to speech of this sort." *Id.* at 750 n.28.²⁰ Section 399, in contrast, is not designed to protect children from indecent speech by channeling broadcasts to particular hours; it constitutes a heavy-handed suppression of speech necessary to an informed citizenry.

Thus, despite the Government's contention, the prohibition of editorializing finds no support in this Court's decisions. In the broadcast medium, as in the print press, the suppression of speech on controversial issues is impermissible.

Section 399's prohibition of editorial speech is especially egregious for three further reasons.

First, Section 399's prohibition is based on the content of speech. It bans only one kind of speech—editorial speech. This Court has always recognized that the First Amendment is particularly designed to prevent content-based suppression and has "sustained content-based restrictions only in the most extraordinary circumstances,"

²⁰ The limited nature of this Court's decision in *Pacifica* is further evidenced by the special First Amendment treatment given to child pornography statutes in *New York v. Ferber*, 102 S. Ct. 3348 (1982). There the Court relied on *Pacifica* to support the proposition that protecting the well-being of minors is a "government objective of surpassing importance" that justifies affording a lesser degree of First Amendment protection. *Id.* at 3355.

Bolger v. Youngs Drug Products Corp., 103 S. Ct. 2875, 2879 (1983). This is true whether the government seeks to bar discussion on a particular topic or more broadly seeks to bar a particular type or format of speech. *Metro-media, Inc. v. City of San Diego*, 453 U.S. 490, 514, 518-19 (plurality opinion); *Consolidated Edison*, 447 U.S. at 537-38; *First National Bank v. Bellotti*, 435 U.S. 765, 784-85 (1978). To allow the Government to ban particular categories of speech would enable it to suppress the potentially most effective and critical form of speech, and thus to suppress criticism.

Second, Section 399 will have a serious chilling effect on public broadcasting because there is no clear-cut line between editorializing and other protected speech. While the Broadcast Bureau of the FCC has said that it "believes that Section 399 should be interpreted as proscribing programs commonly recognized as editorializing," *Accuracy in Media, Inc.*, 45 F.C.C.2d 297, 302 (1973), Representative Springer—the editorializing ban's leading proponent—conceded that "We went over that with our counsel in every way, and we could not come up with any language we thought was meaningful . . ." 113 Cong. Rec. 26,388 (1967). The line between editorials, commentary, analysis, and investigatory journalism is often less than clear. The prohibition on editorials will have an inevitable chilling effect on speech that "falls close to the line separating the lawful and the unlawful." *Speiser v. Randall*, 357 U.S. 513, 526 (1958).²¹

Finally—whether or not section 399 itself was adopted because of government hostility to controversial speech (see below pp. 25-29)—sustaining Section 399 would convey a message to noncommercial and commercial broadcasters alike that Congress or the FCC may act to suppress broadcast speech on public issues if it becomes too

²¹ The Broadcast Bureau further defined editorializing as "the propagation of the licensees' own views on public issues" by management or others speaking on behalf of the licensees. 45 F.C.C.2d at 302. This definition also fails to distinguish adequately between editorials and other journalistic speech.

critical or controversial. Thus, Section 399 affects far more than editorializing; it inhibits all controversial speech. In the long run, the public may be deprived of a wide variety of ideas and information by the ban on editorials.

III. THE PROHIBITION ON EDITORIALIZING CAN- NOT BE JUSTIFIED BY THE SPECIAL CHARAC- TERISTICS OF PUBLIC BROADCASTING

Nonetheless, the Government seeks to justify the statute's suppression of editorial speech because public broadcasters are partially subsidized by federal funds. Brief at 33-47. It suggests that Section 399 is a valid exercise of Congress' Spending Power and relies heavily on this Court's recent decision in *Regan v. Taxation With Representation* ("TWR"), 103 S. Ct. 1997 (1983). In *TWR* the Court upheld a denial of tax exemption status to an organization engaged in lobbying activity. It held that "Congress has not infringed any First Amendment rights or regulated any First Amendment activity. Congress has simply chosen not to pay for TWR's lobbying." *Id.* at 2001.

As discussed below, *TWR* is clearly inapposite both because *TWR* did not involve restrictions on speech by a journalistic entity and because, unlike the statute in *TWR*, Section 399 is not a restriction limited to the expenditure of federal funds. If a station receives any CPB funding, Section 399 prohibits expenditures for editorializing whatever the source of the funds used for editorializing.²²

²² Section 399 is distinguishable from *TWR* for yet another reason. Section 399 discriminates on the basis of speech content by prohibiting the category of speech that is potentially most critical of Government and, as discussed below, was designed to suppress such critical speech. "The case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to 'aim at the suppression of dangerous ideas.'" *TWR*, 103 S. Ct. at 2002 (quoting *Cammarano v. United States*, 358 U.S. 498, 513 (1959)). "A statute designed to discourage the expression of particular views would present a very different question." 103 S. Ct. at 2004 (Blackmun, J., concurring).

A. The First Amendment Precludes Governmental Interference With the Editorial Freedom of Independent Journalistic Entities Even When They Are Dependent on Government Funding

Although the FCC did not specifically set aside frequencies for noncommercial and educational users until 1939, public broadcasting has been in existence since 1919 when the University of Wisconsin began broadcasting over station 9XM.²³ Many of the early licensees were educational institutions.²⁴

Public broadcasting licensees were, like commercial licensees, governed by the Radio Act of 1927²⁵ and then the Communications Act of 1934.²⁶ The history of these Acts is well known.²⁷ Congress rejected federal government ownership and operation of broadcast stations. Instead, Congress chose to adopt a system of public trusteeship under which licensees were to be responsible and accountable for selecting material as fiduciaries for the interests of the people as a whole. Central to this approach, was Congress' evident determination to "preserve values of private journalism" by vesting licensees, commercial and noncommercial alike, "with the widest journalistic freedom consistent with [their] public obligations." *CBS v. DNC*, 412 U.S. at 105, 109-11. This Court has consistently stressed that the exercise of independent editorial judgment is essential to the integrity and inde-

²³ Report of the Carnegie Commission on the Future of Public Broadcasting, *A Public Trust* 33 (1979) [hereinafter cited as *Second Carnegie Report*]; Note, *The Public Broadcasting Act: The Licensee Editorializing Ban and the First Amendment*, 13 U. Mich. J.L. Ref. 541, 543 (1980).

²⁴ *Second Carnegie Report* at 34.

²⁵ Ch. 169, 44 Stat. 1162 (1927).

²⁶ 48 Stat. 1064 (1934), as amended, 47 U.S.C. §§ 151 *et seq.* (1976).

²⁷ See, e.g., *CBS v. DNC*, 412 U.S. at 103-10; *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 379-86; *National Broadcasting Co. v. United States*, 319 U.S. 190, 210-17 (1943).

pendence of journalistic entities which Congress so carefully sought to preserve. *Id.* at 111, 116, 124-25; *FCC v. Mid-West Video Corp.*, 440 U.S. at 704-05.

Noncommercial broadcasters were viewed as "an essential element 'of an adequate national television system'" that would "provide a much needed source of cultural and informational programming for all audiences" ²⁸ As an integral part of the broadcasting community, Congress intended public broadcasters to enjoy the same journalistic independence as other licensees, for "the Act's terms, purposes, and history all indicate that Congress 'formulated a unified and comprehensive regulatory system for the [broadcasting] industry.'" *United States v. Southwestern Cable Co.*, 392 U.S. 157, 168 (1968) (quoting *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940)). ²⁹

It was not until 1962 that Congress provided the first federal assistance to public broadcasters. The Educational Television and Facilities Act of 1962 ³⁰ authorized the expenditure of \$32 million to aid in the construction of noncommercial broadcasting facilities. Nothing in this Act purported to change the independent journalistic status of educational stations. In fact, Congress added a specific prohibition against governmental "direction, supervision, or control" of public broadcasting. 47 U.S.C. § 398(a). ³¹

²⁸ *United States v. Southwestern Cable Co.*, 392 U.S. 157, 175 n.41 (1968) (quoting H.R. Rep. No. 1559, 87th Cong., 2d Sess. 3-4 (1962)).

²⁹ See *Community Television of Southern California v. Gottfried*, 103 S. Ct. 885 (1983) (Communications Act does not impose greater obligation on public broadcasters to provide special programming for hearing impaired); *Accuracy in Media, Inc. v. FCC*, 521 F.2d 288, 291 (D.C. Cir. 1975), cert. denied, 425 U.S. 934 (1976).

³⁰ Pub. L. No. 87-447, 76 Stat. 64 (1962).

³¹ While the Section's language states that government officials are not "authorize[d]" to engage in such activities, the section is captioned "prohibition" and was clearly intended to be such. H. Rep. No. 999, 87th Cong., 1st Sess. 8 (1961); 108 Cong. Rec. 3532 (1962)

Five years later, in response to the report and recommendations of the First Carnegie Commission on the Future of Public Broadcasting,³² Congress enacted the Public Broadcasting Act of 1967.³³ That Act provided additional construction assistance and also, for the first time, appropriated federal funds to supplement private and state and local governmental support for the production of cultural and educational programs. Again, Congress emphasized its determination that public stations retain their status as independent journalistic entities. Thus, Congress noted the central role public broadcasting plays as an integral part of the Nation's broadcast community, 47 U.S.C. § 396(a)(5), and reiterated its intention "to afford [public broadcasters] maximum protection from extraneous interference and control." *Id.* § 396(a)(7). "We wish to state in the strongest terms possible that it is our intention that local stations be absolutely free to determine for themselves what they should or should not broadcast." S. Rep. No. 222, 90th Cong., 1st Sess. 11 (1967). In addition to § 398(a)'s prohibition of governmental interference, Congress took other specific measures to ensure that noncommercial broadcasters would be insulated from any governmental attempts at influence or control. The key to this insulation was the creation of an independent, private "Corporation for Public Broadcasting" responsible for disbursing federal funds while affording broadcasters complete journalistic autonomy. 47 U.S.C. § 396; *Community-Service Broadcasting v. FCC*, 593 F.2d 1102, 1107-08 (D.C. Cir. 1978) (en banc).

Thus, Congress has made clear that public broadcasters are to play a valuable role as an integral part of the

(remarks of Rep. Walter); *id.* at 3533 (remarks of Rep. Harris); *id.* at 3549 (remarks of Rep. Barry).

³² Carnegie Commission on Educational Television, *A Program for Action* (1967).

³³ Pub. L. No. 90-129, 81 Stat. 367 (1967) (codified at 47 U.S.C. §§ 390 *et seq.*).

Nation's press. It has gone to extraordinary lengths to preserve the journalistic integrity and independence of noncommercial licensees. Without doubt, Congress meant for public broadcasting stations to be something very different from government-run entities.³⁴

Having determined to preserve the traditional journalistic function of noncommercial broadcasters and generally to preserve the editorial freedom necessary to that independence, the First Amendment does not permit the Government to intrude selectively by barring editorializing. Subsidization of an independent journalistic entity by government should not mean that the entity loses its First Amendment rights. Numerous lower courts in a variety of contexts have held that the fact that school newspapers or other journalistic entities are government-subsidized does not in any way lessen the First Amendment rights of the editors of those publications.³⁵

³⁴ Not surprisingly the one provision of the 1967 Act other than Section 399 at variance with this approach has also been struck down as unconstitutional. In *Community-Service Broadcasting v. FCC*, the District of Columbia Circuit invalidated 47 U.S.C. § 399(b), which required all noncommercial stations receiving federal funding to make audio recordings of all broadcasts "in which any issue of public importance is discussed." The Court found that this requirement posed a constitutionally unacceptable "risk of direct governmental interference in program content." 593 F.2d at 1105.

The Act has also been construed in other cases to avoid indirect intrusions upon licensee editorial freedom. In *Accuracy in Media, Inc. v. FCC*, 521 F.2d 288 (D.C. Cir. 1975), cert. denied, 425 U.S. 934 (1976), the court held that the FCC could not enforce the Act's "objectivity and balance" of program requirement against CPB since such enforcement would entail governmental supervision in contravention of the statutory scheme providing licensee freedom from interference. See also *Network Project v. CPB*, 561 F.2d 963 (D.C. Cir. 1977) (no private cause of action against Corporation For Public Broadcasting to enforce these requirements), cert. denied, 434 U.S. 1068 (1978).

³⁵ *Antonelli v. Hammond*, 308 F. Supp. 1329, 1337 (D. Mass. 1970); *Avins v. Rutgers*, 385 F.2d 151, 153-54 (3d Cir. 1967), cert. denied, 390 U.S. 920 (1968). See also *Bazaar v. Fortune*, 476 F.2d

In particular, the First Amendment protects against governmental efforts to interfere with the editorial freedom of independent journalistic entities receiving government subsidies. For example, the lower federal courts without exception have held that the First Amendment precludes state universities from banning controversial speech by subsidized school publications.³⁶ Just as government cannot interfere with the journalistic integrity of a student publication, so too the First Amendment does not permit Congress to pick and choose among the types of permissible speech by public broadcasters and to ban the most controversial and potentially critical form of speech.³⁷

570, 575 (5th Cir.), *aff'd as modified en banc*, 489 F.2d 225 (5th Cir. 1973), *cert. denied*, 416 U.S. 995 (1974); *Gambino v. Fairfax City School Board*, 429 F. Supp. 731, 734 (E.D. Va.), *aff'd*, 564 F.2d 157 (4th Cir. 1977); *The Luparar v. Stoneman*, 382 F. Supp. 495, 499-500 (D. Vt. 1974); *Korn v. Elkins*, 317 F. Supp. 138, 143 (D. Md. 1970); *Developments in the Law—Academic Freedom*, 81 Harv. L. Rev. 1045, 1130 (1968).

³⁶ *Bazaar v. Fortune*, 476 F.2d at 575; *Trujillo v. Love*, 322 F. Supp. 1266, 1270 (D. Colo. 1971); *Dickey v. Alabama State Board of Education*, 273 F. Supp. 613 (M.D. Ala. 1967), *vacated as moot sub nom. Troy v. State Univ.*, 407 F.2d 515 (5th Cir. 1968); *Schiff v. Williams*, 519 F.2d 257, 260 (5th Cir. 1975); *see also Joyner v. Whiting*, 477 F.2d 456, 460 (5th Cir. 1973); *Lee v. Board of Regents*, 441 F.2d 1257 (7th Cir. 1971); *Zucker v. Panitz*, 299 F. Supp. 102 (S.D.N.Y. 1969); *ACLU v. Radford College*, 315 F. Supp. 893, 896-97 (W.D. Va. 1978); *Antonelli v. Hammond*, 308 F. Supp. 1329, 1337 (D. Mass. 1970).

³⁷ This Court has also recognized that the journalistic nature of an entity implicates First Amendment protections against State interference. In *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), the Court held that a state could force a shopping center owner to let others speak on his property. The Court distinguished a shopping center from a journalistic enterprise. A statute imposing on the First Amendment rights of a journalistic entity would be different, for that would be "an 'intrusion into the function of editors.'" 447 U.S. at 88 (quoting *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. at 258).

In *Board of Education v. Pico*, 102 S. Ct. 2799 (1982), this Court found a First Amendment limitation on school board control over the content of school libraries. Here, this Court need not reach the

B. The First Amendment Bars Exercise of the Spending Power To Suppress Editorial Speech

TWR is distinguishable for another reason. Section 399, unlike the statute in *TWR*, imposes an unconstitutional condition on the receipt of a governmental benefit. In *TWR*, organizations that were denied certain tax benefits because they engaged in substantial lobbying activity contended that this denial was an unconstitutional condition on the receipt of those benefits.³⁸ But this Court disagreed, finding that the Internal Revenue Code provisions were narrowly drawn regulations governing federal spending (by way of tax benefits) that did not infringe on First Amendment activity.

The Code does not deny *TWR* the right to receive deductible contributions to support its non-lobbying activity, nor does it deny *TWR* any independent benefit on account of its intention to lobby. Congress has merely refused to pay for the lobbying out of public monies. . . . Congress has not infringed any First Amendment rights or regulated any First Amendment activity.

103 S. Ct. at 2001. *See also id.* at 2005 (Blackmun, J., concurring) (any significant restriction of *TWR*'s other channels of communication would pose insurmountable First Amendment problems). The carefully drawn Internal Revenue Code provisions permitted *TWR* to secure the tax benefits for its nonlobbying activity by setting up a lobbying affiliate organization, which would then perform all lobbying activities. I.R.C. § 501(c)(4); *see*

question of First Amendment limits on government control over its own expression, *see generally* *Muir v. Alabama Educational Television Comm'n*, 688 F.2d 1033 (5th Cir. 1982) (en banc), *cert. denied*, 103 S. Ct. 1274 (1983), since it is clear that Congress intended for public broadcasters to be independent journalistic entities.

³⁸ Such organizations were denied tax exempt status and the ability to receive contributions that could be deducted by the individual contributors. I.R.C. § 501(c)(3), (c)(4) (1976).

103 S. Ct. at 2000 & n.6; *id.* at 2004-05 (Blackmun, J., concurring).

In contrast to this narrow regulation of the use of federal funds in *TWR*, Section 399 does not merely deny federal funds for editorializing. It directly restrains First Amendment-protected activity through a sweeping ban on the use of funds from any source for editorializing.³⁹ As the District Court found, "CPB funding in 1977 did not constitute more than approximately 25% of the funding received by funded noncommercial broadcasters and . . . no broadcaster receives more than approximately 33% of its funds through CPB grants." 547 F. Supp. at 385. Most public broadcasting funding comes from private, corporate, and local governmental sources, and many stations received only small federal grants. CPB, *Public Broadcasting Income: Fiscal Year 1982*, at 4 (1983).

Section 399 fails to permit public broadcasters to set up affiliate entities to spend nonfederal funds on editorializing. Broadcast editorializing by a separate entity is impossible since an additional frequency is unlikely to be available for a nonfederally funded affiliate and if the original entity were to make time available to its affiliate on its own frequency, Section 399 would be equally violated. Section 399 thus bars a station receiving any CPB funding from all editorializing no matter how insignificant the federal funding and how unrelated that funding is to editorializing.⁴⁰ Section 399 infringes both the

³⁹ Section 399 originally prohibited editorializing by public broadcasting stations whether or not they received CPB funding. 47 U.S.C. § 399 (1976). Congress amended this provision in the Public Broadcasting Amendment Act of 1981, Pub. L. No. 87-35, 95 Stat. 730, making the ban on editorializing applicable only to stations receiving some CPB funding.

⁴⁰ The government argues that there would be a federal subsidy involved in any editorial speech by noncommercial broadcasters because of federal subsidies of noncommercial station overhead or capital expenses. Brief at 44-45. Such a miniscule and indirect

stations' First Amendment right to spend nongovernmental funds on editorial speech and the rights of nongovernmental contributors to make contributions for editorializing.⁴¹

The Government nonetheless argues that here the use of nonfederal funds is not necessarily restricted since

federal subsidy is too attenuated to justify the outright suppression of privately funded speech. In today's society, if one traces almost any activity back far enough, there is bound to be some incidental federal support. To justify the suppression of speech on such a basis would reduce the First Amendment to a dead letter. It is noteworthy that the Government has urged this Court in another pending case to adopt a commonsense approach rather than to follow to the end "the economic ripples generated by federal aid." Brief for Respondents at 15, *Grove City College v. Bell*, No. 82-792 (U.S., filed Aug. 5, 1983).

The broad ramifications of the Government's argument are illustrated by a recent Government proposal to limit political advocacy by all recipients of federal grants and contracts. 48 Fed. Reg. 3348 (Jan. 24, 1983). As is urged here, it was suggested that such a widespread curtailment of First Amendment activity was constitutional because the receipt of federal funds for overhead costs effectively subsidized political activity. The proposal was recently withdrawn due to its obvious constitutional difficulties. OMB Release No. 82-9 (Mar. 10, 1983). But the fact that it was made demonstrates the potentially wide repercussions of a ruling that the receipt of federal funds (no matter how indirect or inconsequential) justifies the suppression of protected First Amendment activity financed by private funding.

⁴¹ See *Buckley v. Valeo*, 424 U.S. 1, 19, 24-25 (1976). The Government suggests that this deprivation is permissible because public broadcasters are free to express their views on commercial stations or in letters to their contributors. Brief at 41-42, 44. But this Court has repeatedly rejected such attempts to suppress speech on the ground "that it may be exercised in some other place," *Schneider v. State*, 308 U.S. 147, 163 (1939). See *Bolger v. Youngs Drug Products Corp.*, 103 S. Ct. at 2882 n.18; *Consolidated Edison Co.*, 447 U.S. at 541 n.10; *Spence v. Washington*, 418 U.S. 405, 411 & n.4 (1974). Allowing the Government to specify the medium for critical speech would largely undermine the First Amendment.

"any station that finds the ban on editorializing unduly restrictive is free to decline CPB grants." Brief at 41, 42. But the guarantees of the Constitution, "so carefully safeguarded against direct assault," are not "open to destruction" by such indirect means. *Frost & Frost Trucking Co. v. Railroad Commission*, 271 U.S. 583, 593 (1926). Constitutional rights are not for sale whenever the government pays the right price.⁴² "[C]onditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms." *Sherbert v. Verner*, 374 U.S. 398, 405 (1963).

Thus, reliance on the Spending Power does not vitiate the need for proof of a "compelling state interest" to justify suppression of speech. *Id.* at 403, 406; *Speiser v. Randall*, 357 U.S. at 529; *Community-Service Broadcasting v. FCC*, 593 F.2d at 1110 n.17. As the District Court concluded, "Section 399 can survive scrutiny under the First Amendment only if it meets the standard generally used in First Amendment cases, that is, that it serves a compelling government interest and is narrowly tailored to that end." 547 F. Supp. at 384.⁴³ As we next demonstrate, Section 399 serves no such compelling interest.

⁴² *Perry v. Sindermann*, 408 U.S. 593, 597-98 (1972); *Speiser v. Randall*, 357 U.S. 513, 526 (1958); *Elrod v. Burns*, 427 U.S. 347, 359 (1976) (plurality opinion); *Community-Service Broadcasting v. FCC*, 593 F.2d at 1110 n.17.

⁴³ Contrary to the Government's contention (Brief at 35 n.64, 42 n.73) cases upholding restrictions on the First Amendment rights of government employees are inapposite. *E.g.*, *Oklahoma v. CSC*, 330 U.S. 127 (1947); *United Public Workers v. Mitchell*, 330 U.S. 75 (1947); see also *Connick v. Myers*, 103 S. Ct. 1684 (1983); *CSC v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973). These cases all involved the unique interest of prevention of corruption of government service. Certain political activities were found to be inconsistent with the duties of government service, but the statutes allowed employees substantial freedom to express their opinions. 103 S. Ct. at 1692-93; 413 U.S. at 561, 579; 330 U.S. at 94-101.

IV. THE GOVERNMENT HAS NOT ADVANCED ANY COMPELLING INTEREST TO SUPPORT THE SUPPRESSION OF EDITORIALIZING BY PUBLIC STATIONS

A. Suppression of Speech of State and Local Governments Is Not a Legitimate Government Interest

The Government suggests that Section 399 is justified as a legitimate control on the speech of state and local governments. Brief at 6, 21, 36, 42 & n.73. Even if the interest—advanced for the first time on the appeal to this Court—were sufficiently compelling, Section 399 is overbroad.⁴⁴ The premise of this argument is that most non-commercial broadcasters are state and local governments, but the Government ultimately is compelled to admit that many public licensees, including Appellee Pacifica, are privately owned. Brief at 20-21, 42-43 n.73.

Furthermore, the assumption behind this argument—that governmental owners will irresponsibly foster unseemly governmental propagandizing—is far too speculative a harm to justify suppression of speech.⁴⁵ The Government presents no evidence that public stations owned by state entities have engaged in editorial propaganda in editorials before Section 399 was enacted or that they have used other programming, either before or after the ban, for the purpose of disseminating government propaganda. As the Government itself recognizes, many stations owned by governmental entities, including those run by universities, are already insulated from state governmental control or protected from political interference. Brief at 37 n.67.⁴⁶ Therefore, even assuming a compelling interest, there is “no substantially relevant correlation

⁴⁴ See *First National Bank v. Bellotti*, 435 U.S. at 79°.

⁴⁵ See *Consolidated Edison Co.*, 447 U.S. at 543 (“mere speculation of harm does not constitute a compelling state interest”); *Buckley v. Valeo*, 424 U.S. at 93 n.126.

⁴⁶ Many of the government-affiliated public broadcasting stations are university owned. CPB, 1982 *CPB Public Broadcasting Directory*.

between the governmental interest asserted and the State's effort' to prohibit [noncommercial broadcasters] from speaking." *First National Bank v. Bellotti*, 435 U.S. at 795 (quoting *Shelton v. Tucker*, 364 U.S. 479, 485 (1960)).

In any event, federal control of the content of speech of state governmental entities would seriously impinge on state sovereignty and is not a legitimate interest. A state's ability to control the content of its own speech to its citizens ranks high on the list of "indisputabl[e] 'attributes of state sovereignty.'" *Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S. 264, 287-88 (1981) (citation omitted).⁴⁷ If the federal government can interfere with a state's communications with its citizens, it would "allow 'the National Government [to] devour the essentials of state sovereignty.'" *EEOC v. Wyoming*, 103 S. Ct. 1054, 1060 (1983) (citations omitted). Ultimately, the federal government would be able to suppress any criticism by state governments of the federal government.

B. Section 399 Cannot Be Justified On the Ground That It Avoids Taxpayer Subsidization of Unpopular Speech

The Government suggests that the suppression of editorial speech avoids taxpayer subsidization of "private political views that may be unwelcome or even repugnant to many taxpayers." Brief at 39-40 & n.72.

It is difficult to believe that the Government can seriously advance this argument.⁴⁸ If adopted, it would give the Government the most extraordinary power to suppress

⁴⁷ Compare *FERC v. Mississippi*, 456 U.S. 742, 761 (1982) (authority to make governmental decisions is quintessential attribute of state sovereignty).

⁴⁸ At bottom, the Government's argument amounts to no more than a reassertion of its unavailing Spending Power argument in slightly different garb.

unpopular opinion and dissenting views. The First Amendment will not tolerate such abuse.

Even if the Government could refuse to spend money in order to protect the freedom of taxpayers not to subsidize views with which they disagree, the Government certainly cannot urge this interest to deprive other taxpayers (public broadcasters and their contributors) of the right to spend their *own* money on editorial speech.⁴⁹

The Government relies on *Wooley v. Maynard*, 430 U.S. 705 (1977), as authority. There a New Hampshire statute requiring automobile owners to use license plates bearing the state motto was held invalid because individuals were forced to be personal instruments for the state's ideological message. It forced

an individual, as part of his daily life—indeed constantly while his automobile is in public view—to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable.

Id. at 715. But government expenditure of taxpayer money on noncommercial broadcasting does not require taxpayers to affirm their belief in the views expressed by public broadcasters as does the personal display of a message on one's car; such expenditures hardly implicate the "individual freedom of mind" at stake in *Wooley*, *id.* at 714.⁵⁰

⁴⁹ The Government's reliance upon the taxpayer subsidization rationale is also belied by the underinclusiveness of Section 399. See *First National Bank v. Bellotti*, 435 U.S. at 793. That the Government was not concerned with taxpayer subsidization of controversial programming on public broadcasting stations undermines any genuine interest in protecting taxpayers against subsidization of controversial speech. Many taxpayers arguably are unhappy that any of their taxes go to support public television programs of which they disapprove. The Government's argument here suggests that it could and perhaps should exercise control over all public broadcasting content to protect the interests of such taxpayers.

⁵⁰ The Court has made clear that *Wooley* is inapplicable where there is no identification of the individual with particular speech. In *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), the

Likewise the Government cannot properly analogize this situation to cases involving member subsidization of political speech by organizations such as labor unions. *E.g.*, *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *cf.* *First National Bank v. Bellotti* (corporate subsidization by shareholders). Political expenditures by such organizations involve an element of attribution of belief (through membership) that is not present in the case of general taxpayer spending. "Compelled support of a private association is fundamentally different from compelled support of government." *Abood*, 431 U.S. at 259 n.13 (Powell, J., concurring in the judgment).⁵¹

**C. Direct Suppression of Public Broadcaster Speech
Cannot Be Justified As Designed To Prevent Indirect Efforts To Influence Such Speech**

The Government also suggests that Section 399 serves a compelling interest by protecting public broadcasters from reductions in funding as punishment for critical editorializing and by protecting them from Congressional pressure that would jeopardize their objectivity. Brief at 34-35, 38. Congress determined, the Government argues, that only by banning editorial speech could it ensure that the Government would not interfere with the objectivity of noncommercial broadcasting. Brief at 35, 38.

The simplest answer to the Government's argument is that, if the Government wants to avoid pressure on non-

Court held that the First Amendment did not prohibit the State from requiring the owner of a shopping center to allow petitioning activity on his center because the views expressed by pamphleteers or petitioners would "not likely be identified with those of the owner." *Id.* at 87.

In *Wooley*, the Court indicated that the national motto "In God We Trust" on United States currency would pose a different case than New Hampshire's license plate since carrying currency in one's pocket would not associate the motto with its carrier. 430 U.S. at 717 n.15.

⁵¹ "[E]very appropriation made by Congress uses public money in a manner to which some taxpayers object." *Buckley v. Valeo*, 424 U.S. at 91-92.

commercial broadcasters, it has full control over its own conduct. It need not violate the First Amendment (by suppressing all editorial speech) in order to keep itself from attempting to influence the content of editorial speech. It need only exercise self-restraint. The First Amendment requires the exercise of such "less drastic means." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).⁵²

Other possible "less drastic means" have already been adopted. The Government seems to forget that Congress has already prohibited any attempt at governmental influence or control of public broadcasters by barring

any department, agency, officer, or employee of the United States [from exercising] any direction, supervision, or control over public [broadcasting], or over the Corporation or any of its grantees or contractors

47 U.S.C. § 398(a). And Congress has already provided significant insulating protection against attempts at governmental pressure on public broadcasters. *Id.* § 396.

If these measures were deemed insufficient, additional insulating measures rather than the outright suppression of speech could be adopted. A more specific statute making it a criminal offense for Congressmen or other government officials to attempt to influence the content of public broadcasting editorials is one alternative. See similar state statutes cited in Government's Brief at 37 n.67.

In any event, as the District Court found,⁵³ the fear of station submission to governmental control or pressure

⁵² To the extent that the Government argues that suppression of editorial speech is necessary to achieve fair or balanced programming, it is clear that the suppression of speech is not a permissible remedy for the perceived evil. *Brown v. Hartlage*, 456 U.S. at 61. Indeed, even the Fairness Doctrine has been sustained as constitutional only because it "contemplates a wide range of licensee discretion." *FCC v. Mid-West Video Corp.*, 440 U.S. 689, 705 n.14 (1979); see *Red Lion Broadcasting Co. v. FCC*.

⁵³ 547 F. Supp. at 387.

is too speculative to sustain Section 399's sweeping First Amendment infringement. Preventing public broadcasting stations from using private funds to editorialize about potholes in Chicago or the problem of low level radiation is hardly necessary to protect against efforts to influence editorials critical of the federal government.⁵⁴ The public should not be deprived of all editorial speech in order to avoid speculative licensee temptation to succumb to governmental pressure.

The Government's reliance on the speculative fear of improper governmental influence over public broadcasters is quite ironic in view of the fact that Section 399 appears to embody the very evil (Government interference with undesired broadcaster speech) the Government seeks to avoid. There are numerous indications in the legislative history that Section 399 was designed to suppress critical speech by public broadcasters.⁵⁵ Congressmen supporting passage of the legislation expressed concerns

⁵⁴ A review of recent editorials by local CBS stations reveals the great variety in type and subject matter of broadcast editorials. Many of these are unlikely to be of any conceivable interest to any federal official. In a recent two-week period editorials ranged from localized concerns such as fixing potholes and a proposal for a four-day school week in the Chicago area (WBBM-TV), and the revitalization of the South Bronx (WCBS-AM) to more national concerns such as the problem of low level radioactive wastes (WBBM-TV), this Court's abortion decisions (KMOX St. Louis), no fault divorce (WBBM-TV), and the job market for the handicapped (WCAU-AM Philadelphia).

⁵⁵ This Court has just recently noted that statutes based on "any impermissible or censorial motive on the part of the legislature" cannot withstand First Amendment scrutiny. *Minneapolis Star & Tribune*, 103 S. Ct. 1365, 1369 (1983). See also *Board of Education v. Pico*, 102 S. Ct. 2799, 2810 (1982) (plurality opinion); *id.* at 2813, 2814 (Blackmun, J., concurring in part); *Metromedia, Inc. v. San Diego*, 453 U.S. at 566 (Burger, C.J., dissenting) (finding no danger that anti-billboard ordinance was a "mask for promoting or deterring any viewpoint or issue of public debate").

that they had "been editorialized against"⁵⁶ and fears that public broadcasting would editorialize on controversial subjects such as home rule for the District of Columbia, fluoridation, and the President's Vietnam War policy.⁵⁷ Given this legislative history, it is all the more clear that the interest of "assuring objectivity" in the

⁵⁶ See *Hearings on H.R. 6736 and S. 1160 Before House Committee on Interstate and Foreign Commerce*, 90th Cong., 1st Sess. 641 (remarks of Rep. Springer) ("There are some of us who have very strong feelings because they have been editorialized against."); 113 Cong. Rec. 26391 (1967) (remarks of Rep. Keith) ("It is conceivable that [a certain noncommercial television broadcast] could . . . have adversely affected my candidacy for reelection."); *id.* (remarks of Rep. Joelson) ("Those of us in public office are in a position where newspapers, radio, or TV stations can say anything they wish about us. . . . Therefore, the right of editorializing should be very, very carefully scrutinized."); *House Hearings on H.R. 6736 and S. 1160*, at 389 ("Yes, I have been subjected to editorializing.") (remarks of Rep. Moss); see also *id.* at 415-16. Senator Thurmond in criticizing the Senate version of the bill without the editorial ban warned, "Those who vote for this bill are voting for something that has a vast potential to be used against them." 113 Cong. Rec. 12,992 (1967).

⁵⁷ *House Hearings on H.R. 6736 and S. 1160*, at 307 (remarks of Rep. McCormack) (fluoridation); *id.* at 391 (remarks of Rep. Springer) (home rule); *id.* at 439 (remarks of Rep. Kuykendall) ("One man's idea of a completely unbiased editorial may be completely biased to another man. This is something that is troubling some of us."); *id.* at 596 (remarks of Rep. Macdonald) (editors might take "very strong positions about a controversial subject" or criticize the President's war policy).

The "legislative history is replete with troubling statements." *Community-Service Broadcasting*, 593 F.2d at 1128 n.25 (Robinson, J., concurring in the result). See Lindsey, *Public Broadcasting: Editorial Restraints and The First Amendment*, 28 Fed. Com. B.J. 63, 81 (1975); Toohey, *Section 399: The Constitution Giveth and Congress Taketh Away*, 6 Educ. Broadcasting Rev. 31, 34 (1972) ("[T]he purpose of Section 399 was clear: to prevent Congress from creating a monster that might someday turn on its creator. Therefore, to achieve its own self-protective ends Congress simply legislated away a significant part of educational broadcasters' right of free speech.").

face of Congressional pressure will not support the statute.⁵⁸

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.

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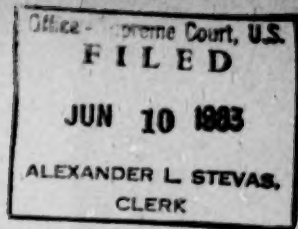
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September 12, 1983

⁵⁸ Section 399 also provides that

No noncommercial educational broadcasting station may support or oppose any candidate for political office.

47 U.S.C. § 399. Although Amici believe that this restriction on political endorsements is unconstitutional, Appellees have not challenged this part of Section 399. This Court therefore need not reach the question of the constitutionality of a ban on public broadcaster involvement in partisan elections. Cf. *First National Bank v. Bellotti*, 435 U.S. at 788 n.26 (not reaching question of whether Congress could restrict corporate participation in political campaigns for election to public office).



No. 82-912

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

FEDERAL COMMUNICATIONS COMMISSION,

Appellant,

v.

LEAGUE OF WOMEN VOTERS OF CALIFORNIA, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF OF AMICUS CURIAE
MOBIL CORPORATION
IN SUPPORT OF APPELLANT,
FEDERAL COMMUNICATIONS COMMISSION

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

FEDERAL COMMUNICATIONS COMMISSION,
Appellant,

v.

LEAGUE OF WOMEN VOTERS OF CALIFORNIA, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF OF *AMICUS CURIAE*
MOBIL CORPORATION
IN SUPPORT OF APPELLANT,
FEDERAL COMMUNICATIONS COMMISSION

INTRODUCTION

This case is a review of a decision by the United States District Court for the Central District of California which held unconstitutional that portion of 47 U.S.C. § 399 (West Supp. 1982) (hereinafter "Section 399") which prohibits noncommercial educational broadcasting stations which receive funding from the Corporation for

Public Broadcasting from "editorializing."¹ Section 399 provides: "No noncommercial educational broadcasting station which receives a grant from the Corporation under subpart C of this part may engage in editorializing. No noncommercial educational broadcasting station may support or oppose any candidate for political office."

The opinion of the District Court is reported at 547 F. Supp. 379.

The question presented in this case is whether Section 399, which prohibits "editorializing" by noncommercial educational broadcasting stations that receive grants from the Corporation for Public Broadcasting, violates the First Amendment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1252.

Mobil Corporation is filing this brief *amicus curiae* in support of appellant, Federal Communications Commission, with the consent of the parties, as provided for in the Rules of this Court.

I. INTEREST OF *AMICUS CURIAE* MOBIL CORPORATION

Mobil Corporation (herein referred to as "Mobil") is a corporation organized and existing under the laws of the State of Delaware. Its wholly-owned, principal operating subsidiary is Mobil Oil Corporation, a New York corporation. In addition, Mobil owns Container Corporation of America and Montgomery Ward and Company, Inc. and its subsidiaries.

Mobil has a continuing interest in preserving the integrity of noncommercial educational broadcasting or, as it

¹ Section 399's prohibition of editorializing means only that public stations may not broadcast editorials "representing the opinion of the management of such station." Public stations are otherwise

is more commonly called, "Public Broadcasting,"² For over a decade, Mobil has been a grantor or underwriter of substantial funds directly or indirectly made available to individual public television broadcast stations. These grants have made, and continue to make possible such well known and well accepted programs as the "Masterpiece Theatre" and "Mystery" series, among others, which are aired over the Public Broadcasting System (hereinafter referred to as "PBS").³

Mobil has reason to believe that its grants have made a unique cultural contribution to American viewing audiences by making available quality educational programming that would not otherwise have been produced or shown in the United States. This genre of programming has become an important educational, cultural and entertainment facet of American life, as envisioned by the framers of the Public Broadcasting Act, and Mobil is therefore committed to this undertaking.

Mobil's interest in this case rests on two main premises: (1) that Section 399's prohibition against public stations endorsing any editorial view aired by such a station as its own viewpoint prevents public broadcasters from becoming or being perceived as a propaganda organ for the gov-

free to editorialize and broadcast a "balanced, fair and objective presentation of controversial issues." See *infra* notes 37-42 and accompanying text.

²The terms "noncommercial educational broadcasting" and "public broadcasting" will be used interchangeably throughout this brief. Public broadcasting was established by the enactment of the Public Broadcasting Act of 1967 (codified at 47 U.S.C. § §390 et seq.), an act which created the Corporation for Public Broadcasting (CPB) and authorized it to fund various programming activities of local public broadcast stations licensed by the Federal Communications Commission through allocations from Congress.

³PBS is a nonprofit membership corporation which distributes public, noncommercial television programs to its members.

ernment or for any other special interest; and, (2) that Section 399's prohibition of public stations' endorsement of any editorial as their own viewpoint reduces the possibility that a government-supported position will unduly influence and chill the free exchange of ideas intended to be fostered by the First Amendment.

The phenomenal impact of television on the American viewing public cannot be denied. Therefore, Mobil submits that there is a danger that the editorial viewpoints endorsed by public stations which are dependent upon the federal government for a significant portion of their revenues will be perceived by the public as at least approved by the federal government if not a statement of the government's position on the issue in question. Furthermore, Mobil is of the view that public broadcasters receiving significant funding from tax dollars should not have the right, on the one hand, to use the public airwaves pursuant to a license issued by the Federal Communications Commission, and, on the other hand, to couple this privilege with the right to endorse specific political or social views. Mobil believes that public broadcasting stations are likely to lose private financial support from both corporate contributors and the public if they become involved in the business of endorsing editorial views.

Contrary to the lower court's holding, experience demonstrates that reliance on the Fairness Doctrine is of little or no assistance in efforts to invoke First Amendment rights of free expression. In addition, with the persistent and many-faceted attacks on the Fairness Doctrine and Equal Time provisions, and the broadcasters' demand for absolute First Amendment freedoms for themselves to the exclusion of all others, this Court should not lose sight of the First Amendment rights of persons other than broadcasters. The lower court would have this Court believe that Section 399 presents only a simple question

of violation of broadcasters' First Amendment rights. This is not the case. There are other significant First Amendment rights at stake.

For the reasons hereinafter set forth, Mobil respectfully submits that the United States District Court for the Central District of California erred on legal, technical, and policy grounds in finding the editorializing prohibition of Section 399 to be unconstitutional.

SUMMARY OF ARGUMENT

The court below erred in finding the Section 399 prohibition of "editorializing" unconstitutional because it did not apply the proper standard of review. The lower court misinterpreted precedent concerning application of the compelling interest test because it improperly believed that there is only one standard of review appropriate for analysis of challenges brought under the First Amendment. The lower court also erred by refusing to recognize that the broadcast medium has always been treated uniquely: the Supreme Court has held that broadcasters have limited First Amendment rights which must be balanced against the public's First Amendment rights.

The Supreme Court has determined that regulations, such as the one currently under review, which only incidentally restrict First Amendment expression in furtherance of a governmental purpose unrelated to speech, are constitutional if they satisfy the criteria enumerated in *United States v. O'Brien* and its progeny. An application of this test to the facts and circumstances surrounding the prohibition of "editorializing" establishes that the prohibition is constitutional. The governmental interest in enacting the prohibition of "editorializing" was intended to preserve the integrity of public broadcasting and was unrelated to the suppression of free speech. The prohibition serves a substantial, if not compelling government interest by preventing public broadcasting stations from becoming government propaganda tools. The

incidental restriction on alleged First Amendment freedoms created by the prohibition of "editorializing" is no greater than is essential, and it was within the constitutional power of the government to create the prohibition.

If the Supreme Court does not reverse the lower court's decision invalidating the first provision of Section 399 which prohibits "editorials", enforcement of the second provision of Section 399 will be constitutionally impossible. The second provision of Section 399 prohibits public broadcasting stations from supporting or opposing candidates for political office. Because editorial endorsements may be construed as support for or opposition to candidates, enforcement of the prohibition against endorsement of candidates will necessitate unconstitutional content control. Administrative agencies and courts will be forced to distinguish between permissible editorials and editorials which support or oppose candidates.

If the Supreme Court does not reverse the lower court's decision, a number of practical difficulties will arise. Public broadcasting stations will have to spend significant amounts of their limited resources defending themselves in administrative proceedings and lawsuits initiated by candidates seeking to prevent the airing of editorials which can be construed as support for opposing candidates. Additionally, public stations may be compelled under the Equal Time provisions to provide an opportunity for candidates or their spokesmen to appear on the air. Such presentation of rebuttals could only occur at expense to and in frustration of public stations' primary purposes, the production and broadcasting of cultural and educational programming.

Finally, unless the lower court's decision invalidating the prohibition of editorial endorsements by public stations is reversed, there is a danger that their positions will be perceived by the public as either approved by the gov-

ernment, or as a statement of the government's position. The Fairness Doctrine will provide no remedy for this situation. The Fairness Doctrine will not assure any balance in the presentation of viewpoints, contrary to the lower court's belief, because the public broadcasters will retain almost exclusive control over the selection of issues and viewpoints to be presented. Because of the perceived government endorsement of viewpoints presented over public broadcasting stations, and because the public broadcaster has almost exclusive control over what is aired, there will not be the kind of uninhibited, robust and wide open exchange of views to which the public is constitutionally entitled.

II. ARGUMENT

A. THE COURT BELOW ERRED IN FINDING SECTION 399 UNCONSTITUTIONAL BECAUSE IT DID NOT APPLY THE PROPER STANDARD OF REVIEW

1. Misinterpretation of Precedent

The lower court's reasoning, if carried to its logical conclusion, would admit of only a single analysis of the constitutionality of regulations restraining First Amendment expression. While the court admitted that Section 399 is merely a restriction on the means by which issues of public importance are debated,⁴ it analyzed the Sec-

⁴League of Women Voters of California v. FCC, 547 F. Supp. 379 (C.D. Cal. 1982). The court stated that: "Despite this narrow construction of §399, it cannot be denied that the ban on editorializing limits the means by which certain noncommercial licensees may participate in the debate of issues of public interest and importance . . ." *Id.* at 383. Consequently, Section 399 does not prohibit the expression of views on controversial issues of public importance, provided the surrounding facts and circumstances do not indicate that such views are intended as the official opinion of the public broadcast station. This is the only logical interpretation of Section 399 in light of the expressed congressional policy of fostering "a vital public affairs medium" in public broadcasting and the

[footnote continued]

tion as if its purpose is to prevent the discussion of public issues altogether.⁵ To the contrary, this Court has always distinguished between direct limitations on the content of speech⁶ and limitations which are only incidentally directed at speech (*i.e.* limitations which further a governmental purpose unrelated to speech). The lower court completely ignored this established distinction and incorrectly applied the compelling interest standard.

Rather than limiting its analysis to the compelling interest test, the lower court should have considered other judicial standards of review and applied the one appropriate to the type of incidental restriction involved here. Instead of trivializing the First Amendment by adopting an absolutist interpretation of the restrictions it places on government regulation of free expression, this Court has developed a multi-tiered analysis of the constitutionality of such statutes. A law which is "directed at speech itself" must be narrowly drawn and serve a compelling

specific prohibition against FCC censorship in Section 326 of the Communications Act (47 U.S.C. § 326), *Complaint of Accuracy in the Media*, 45 F.C.C. 2d 297, 302 (1973).

⁵This Court has held that "general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved." *Konigsberg v. State Bar of California*, 366 U.S. 36, 50-51 (1961).

⁶In *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978), this Court held that where "a prohibition is directed at speech itself" a compelling governmental interest must be shown. This Court has also held that a compelling governmental interest must be shown where speech is regulated on the basis of its content. *See*, *Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269, 277 (1981); *Carey v. Brown*, 447 U.S. 455, 461 (1980); *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). For a discussion of this Court's opinions concerning incidental restrictions on speech which must be supported by a substantial governmental interest, *see infra* notes 17-23 and accompanying text.

state interest.⁷ A law which incidentally limits First Amendment freedoms must be within the constitutional power of the government, further an important or substantial governmental interest which is unrelated to the suppression of free speech, and restrict alleged First Amendment freedoms no more than is essential to the furtherance of such interest.⁸ A restriction that regulates only the time, place or manner of speech may be imposed so long as it is reasonable.⁹ Finally, this Court has recognized the unique characteristics of the broadcast medium and developed a balancing test applicable to First Amendment rights of broadcasters and the public.¹⁰ Because the prohibition against public stations adopting an editorial view as their own only incidentally restrains broadcasters' speech, and because broadcasting has never been protected by the full panoply of First Amendment protections, the lower court should have demanded only that a substantial government interest be demonstrated.

The lower court relied on *Consolidated Edison Co. v. Public Service Comm. of New York*, 447 U.S. 530 (1980) and *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765

⁷ Bellotti, *supra* note 6 at 786.

⁸ *United States v. O'Brien*, 391 U.S. 367, 377 (1968), cited in *NAACP v. Claiborne Hardware Co.*, 452 U.S. 61, 101 S.Ct. 2176, 2183 n. 7 (1981). In *O'Brien* the court stated that: "We think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." 391 U.S. at 377.

⁹ *Consolidated Edison Co. v. Public Service Commission of New York*, 477 U.S. 530 (1980), cited in *U.S. Postal Service v. Council of Greenburgh*, 453 U.S. 114, 101 S.Ct. 2676, 2686 (1981); *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 101 S.Ct. 2559, 2564 (1981).

¹⁰ See, e.g., *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

(1978) in finding Section 399 unconstitutional. Granted, if Section 399 actually involved a direct restriction on the discussion of public issues, the holdings in these two cases would be appropriate. However, because the instant case involves only a restriction on the endorsement of a view by a public broadcaster and not a prohibition on the discussion of public issues, the lower court's reliance on these holdings is misplaced. In both *Consolidated Edison* and *Bellotti*, the Supreme Court said in dictum that only a substantial government interest would have to be demonstrated to establish the constitutionality of incidental restrictions on free speech, although the statutes under analysis in both cases directly restricted free speech and were not justified by a compelling interest. The lower court failed to take note of this distinction and misapplied the holdings of the two cases.

2. The Broadcast Medium Has Been Treated Uniquely Because Of Its Nature And There Is No Reason To Abandon Prior "Balancing" Considerations

Completely dismissing Supreme Court precedent which establishes the unique treatment of broadcasters' free speech rights, the lower court incorrectly held that Section 399 can survive scrutiny under the First Amendment only if it meets the stringent compelling interest standard.¹¹

This Court has recognized that "because the broadcast media utilize a valuable and limited public resource" they "pose unique and special problems not present in the traditional free speech case." *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 101 (1973). Justice Marshall, writing for the majority in *FCC v. Nat'l Citizens Committee for Broadcasting*, stated that it is a "fundamental proposition that

¹¹ *League of Women Voters*, 547 F.Supp. at 384.

there is no 'unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish.' " 436 U.S. 775, 799 (1978).

This Court has observed that First Amendment issues regarding broadcast licensees should be analyzed in light of the congressionally established statutory and regulatory scheme:

Balancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed is a task of great delicacy and difficulty. The process must necessarily be undertaken within the framework of the regulatory scheme that has evolved over the course of the past half century. For, during that time Congress and its chosen regulatory agency have established a delicately balanced system of regulation intended to serve the interests of *all* concerned. *Columbia Broadcasting System*, 412 U.S. at 102. (emphasis added).

Such an analysis demonstrates that Congress created a regulatory system which accommodates the First Amendment interests of the public and of the private broadcast licensees. In establishing its legislative scheme for the regulation of the broadcast medium, Congress was cognizant of the fact that the nation's airwaves are a limited public resource not subject to private ownership. Thus, in enacting a regulatory scheme for the broadcast medium, Congress was sensitive to the need to protect the rights of the public.¹² The purpose of the First Amendment in the context of broadcasting is "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

¹² *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973).

Although a broadcast licensee does possess a large measure of journalistic freedom, that freedom is not coterminous, for example, with that exercised by a newspaper. "A licensee must balance what it might prefer to do as a private entrepreneur with what it is required to do as a 'public trustee.'" *Columbia Broadcasting System*, 412 U.S. at 118.¹³ Broadcasters consistently have not been accorded the same First Amendment rights as newspaper publishers for that very reason.¹⁴ Thus, although the First Amendment has been held to protect newspaper publishers from being required, for instance, to print the replies of those whom they criticize,¹⁵ it does not afford any such protection to broadcasters. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). In fact, pursuant to *Red Lion*, *supra*, in matters involving personal attacks the broadcasters must give reasonable reply time to the victims.¹⁶

Because of the unique nature of the broadcast medium, and based on the fact that there are several established standards for reviewing legislation concerning First

¹³ A demonstrably assured historical meaning of the First Amendment is that government may not generally treat publication as a privilege to be indulged only on condition of a prior license. A prior license, however, is the foundation of the 1934 Communications Act as no one can broadcast without a license, and licenses are issued by the Government to relatively few applicants who, the FCC finds, will serve the public interest. Furthermore, licensees must continue to serve the public interest or their licenses may be revoked. See, e.g., 47 U.S.C. § 309(a) and 312. Any applicant for a broadcast facility is completely aware of this proposition, and accepts a license conditioned upon it. The political editorializing and personal attack access obligations were upheld in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), because such regulations promoted, in the Court's opinion, First Amendment rights of the greatest importance, i.e., that of the general public "to receive suitable access to social, political, esthetic, moral and other ideas and experience." *Id.* at 389-390.

¹⁴ *FCC v. Pacifica Foundation*, 438 U.S. 726, 748.

¹⁵ *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

¹⁶ See also, 47 CFR § 73.121.

Amendment rights, the lower court erred by holding that the only standard of review available to the court was the compelling interest standard.

B. A REGULATION WHICH ONLY INCIDENTALLY RESTRAINS FIRST AMENDMENT EXPRESSION IN FURTHERANCE OF SUBSTANTIAL GOVERNMENTAL INTERESTS SHOULD BE ANALYZED UNDER A TEST LIKE THAT ESTABLISHED IN *UNITED STATES V. O'BRIEN*

1. The *O'Brien*-Type Test Is Proper Because Section 399 Only Incidentally Restrains Speech

The United States Court of Appeals for the District of Columbia Circuit recently used the test announced by this Court in *United States v. O'Brien*, 391 U.S. 367 (1968), to analyze the constitutionality of a former provision of Section 399.¹⁷ The court stated that the threshold for applying the *O'Brien* test is that a statute imposes at least incidental restraints on First Amendment freedoms.¹⁸

A number of this Court's most recent opinions also indicate that the *O'Brien* test is appropriate for analysis of sections of regulatory statutes which incidentally re-

¹⁷ *Community-Service Broadcasting v. FCC*, 593 F.2d 1102 (D.C. Cir. 1978). The Court of Appeals for the District of Columbia used both the four-part *O'Brien* test and a compelling interest test to evaluate a provision in Section 399 which required public stations to keep a recording of all broadcasts "in which any issue of public importance is discussed." 593 F.2d 1102, 1114 (D.C. Cir. 1978). The compelling interest test applied to this provision because it was "directed at speech itself" in the sense that it regulated the content of only those broadcasts which had to do with "issues of public importance." The Circuit Court indicated, however, that, but for the fact that this provision regulated the content of broadcasts, the four-part *O'Brien* test is the appropriate analysis to use in determining the constitutionality of provisions in Section 399. The *O'Brien* test is the correct one to use because Section 399 imposes only "incidental restraints on First Amendment Freedoms." *Id.* at 1114.

¹⁸ *Id.* at 1114.

strict First Amendment expression in furtherance of important and substantial governmental objectives. For example, in *NAACP v. Claiborne Hardware Co.*, this Court stated that "[g]overnmental regulation that has an incidental effect on First Amendment freedoms may be justified in certain narrowly defined instances."¹⁹ In *Schad v. Borough of Mt. Ephraim*, this Court observed that regulations which are "narrowly drawn to avoid unnecessary intrusion on freedom of expression" should be analyzed under the *O'Brien* test.²⁰ In *Consolidated Edison Co. v. Public Service Commission*, this Court stated that "[t]he *O'Brien* test applies to regulations that incidentally limit speech where the 'governmental interest is unrelated to the suppression of free expression . . .'"²¹ In *First National Bank of Boston v. Bellotti*, this Court indicated that the *O'Brien* test is appropriate where a governmental regulation protects "from an evil shown to be grave, some interest clearly within the sphere of government concern."²² In light of these indications by the Supreme Court of the sort of regulation which should be analyzed under the *O'Brien* test,²³ this Court should

¹⁹ ___ U.S. ___, 102 S.Ct. 3409, 2425 (1982).

²⁰ 452 U.S. 61, 101 S.Ct. 2176, 2183 n.7 (1981).

²¹ 447 U.S. 530, 541 n.9 (1980).

²² 435 U.S. 765, 786 n.23 (1978).

²³ In addition to these explicit applications of the *O'Brien* test, the Supreme Court has applied the *Konigsberg* rule that sections of general regulatory statutes which only incidentally restrict free speech may be found constitutional. See *supra* note 5. For example, the Supreme Court has twice held that sections of the National Labor Relations Act making it an unfair labor practice to boycott a secondary business impose "no unconstitutional restrictions upon speech protected by the First Amendment." *NLRB v. Retail Store Employees Union*, 447 U.S. 607, 609 (1980). In *International Longshoremen's v. Allied International*, 456 U.S. 212, 102 S.Ct. 1656, 1665 (1982), the Supreme Court held that since "[t]he labor laws reflect a careful balancing of interests . . . [and] there are many ways in which a union and its individual members may express

[footnote continued]

apply an *O'Brien*-type test in this case and require that the government demonstrate a substantial interest in maintaining the prohibition of endorsement by public stations of an editorial viewpoint.

2. An Application Of The Four-Part *O'Brien*-Type Test Demonstrates That the Section 399 Prohibition Against Public Stations' Endorsement Of Editorial Viewpoints Does Not Violate The First Amendment

a. The Governmental Interest In Enacting The Section 399 Prohibition Of "Editorializing" Was Unrelated To The Suppression Of Free Speech

An analysis of the legislative history discussing Section 399²⁴ reveals that Congress intended to further two objectives by prohibiting public stations from adopting an editorial viewpoint as their own. Congress intended to prevent public stations from becoming propaganda tools for the federal government or for any other donor of sig-

their opposition to Russian foreign policy without infringing upon the rights of others" by violating the section of the Act barring secondary boycotts, the prohibition of secondary boycotts was not violative of the First Amendment. Likewise, since the Public Broadcasting Act reflects a careful balancing of interests, Section 399 should be evaluated under the four-part *O'Brien* test rather than a compelling interest test. Section 399 is not "directed at" public broadcasters' speech, but, instead, only incidentally restricts such speech as part of a larger regulatory scheme designed to ensure that public broadcasting stations are protected from pressure to adopt the editorial viewpoints of those sources of financial support upon which they are dependent.

²⁴ A determination of what the government interest is in connection with any statute requires a review of the legislative history created at the time of the law's enactment. The Circuit Court of Appeals for the District of Columbia recognized this principle in *Community-Service Broadcasting v. FCC* when it applied the "governmental interest in its enactment" was unrelated to suppression of free speech. 593 F.2d 1102, 1114 (D.C. Cir. 1978) (emphasis added).

nificant funding. Additionally, Congress intended to promote the effective use by public stations of their limited resources for the production of high quality educational and cultural programming.

The House Report on the Public Broadcasting Act of 1967 established the Congressional policy that "... educational stations must not be permitted to become vehicles for the promotion of one or another political cause, party or candidate."²⁵ The Senate adopted this policy and stressed that the prohibition in Section 399 of "editorializing" is narrowly drawn and "limited to providing that no noncommercial educational broadcast station may broadcast editorials representing the opinion of the management of such station."²⁶

The prohibition against public stations endorsing a viewpoint as their own was also intended to further the fundamental purposes behind the creation of the Corporation for Public Broadcasting and the Public Broadcasting System. In its statement of the purpose of the Public Broadcasting Act of 1967, the House Committee charged with analyzing the legislation identified three purposes; to provide funding for broadcast facilities, to provide funds "for cultural and educational programs of the highest quality so that the facilities provided under the bill can be productively utilized" and to provide for a study of instructional television.²⁷

Notably, it was not a purpose of the Public Broadcasting Act of 1967 or of Section 399 of the Act to suppress free speech. Instead, the legislation had the positive goals of creating a new broadcasting system and supplying the "educational broadcasting stations" which would make

²⁵ H.R. 572, reprinted in 1967 U.S. Code Cong. & Ad. News 1799, 1810.

²⁶ Conf. R. No. 7904, reprinted in 1967 U.S. Code Cong. & Ad. News 1834, 1835.

²⁷ See *supra* note 25 at 1799.

up the system "with programs of a diverse, cultural and educational nature."²⁸

The prohibition against public stations adopting any editorial opinion as their own was the result of two Congressional conclusions. Congress concluded that there would be less risk that public stations would be subjected to pressure from the federal government or other important sponsors to promote a particular viewpoint if public stations could not editorialize.²⁹ In this sense, Section 399's prohibition of "editorializing" was an integral part of "a carefully balanced system of dual checks against political influence"³⁰ over public stations which were intended to be devoted to cultural and educational programming.

Additionally, it is apparent from the statement of the purposes of the Public Broadcasting Act that Congress had concluded that any editorializing by public stations could only occur at a cost to and in frustration of Congress' intention that public stations be committed to the production of cultural and educational programming.³¹

Neither of these Congressional conclusions was related to the suppression of free speech. In the alternative, the House Committee which studied the Public Broadcasting Act stated that "[i]t should be emphasized that this section [§ 399] is not intended to preclude balanced, fair and objective presentations of controversial issues by noncommercial stations."³² Therefore, it is apparent from a thorough analysis of the legislative history of Section 399 that the governmental interest in prohibiting

²⁸ See *supra* note 25 at 1810.

²⁹ *Id.*

³⁰ Community-Service Broadcasting, 593 F.2d at 1109.

³¹ See *supra* note 25 at 1799.

³² See *supra* note 25 at 1810.

public stations from adopting an editorial viewpoint as their own was only incidentally related to the suppression of free speech.

b. The Section 399 Prohibition On "Editorializing" Serves A Substantial, If Not Compelling, Government Interest

A thorough analysis of the legislative history of the Public Broadcasting Act reveals that Congress was quite concerned that public broadcasters remain politically neutral and not become propaganda organs for Congress or any other branch of the government. For example, during debate on the bill on the Senate floor, Senator Byrd expressed his "great fear of Government propaganda."³³ Senator Thurmond expressed a similar concern that the bill "could be used to develop and disseminate propaganda promoting the policies and programs of the Departments of Health, Education, and Welfare; Housing and Urban Development; Justice; Agriculture; Commerce; and so on. We would have propaganda designed to influence pending legislation, whether authorization or appropriation."³⁴ Representative Carter, who opposed the bill in committee but later voted for passage on the House floor, said that: "The thing that frightens us is the possibility of editorializing and controlling public opinion by a group, or a control group in Washington. That is what is of concern to most of us."³⁵ Representative Brotzman, minority member of the committee, asserted that "[t]he fear of Government control of programming was recurrent during consideration of this bill by my committee. In my mind it was and is a justifiable fear. However . . . I believe we were successful in adding

³³ 113 Cong. Rec. 12990 (1967).

³⁴ 113 Cong. Rec. 12992 (1967).

³⁵ Public Broadcasting Act of 1967: Hearings before the House Committee on Interstate and Foreign Commerce, 90th Cong. 1st Sess. 342 (1967).

amendments [including one prohibiting editorializing and endorsement of political candidates by noncommercial stations] which along with a reasonable degree of vigilance on the part of Congress—will prevent this corporation from becoming a Government propaganda tool.”³⁶

In light of the above analysis of legislative history, it is apparent that Congress had a substantial interest in enacting the prohibition against endorsements by public stations of editorial views: to ensure that public broadcast stations should not be permitted to endorse a particular position and thus give the impression of governmental endorsement of that position.

c. The Incidental Restriction On First Amendment Freedoms Created By The Section 399 Prohibition Of Editorializing Is No Greater Than Is Essential

An analysis of whether there is a less restrictive method by which Congress could have sought to protect public stations from being subjected to pressure to editorialize in favor of the interests of the federal government³⁷ or other important financial supporters, must begin by focusing on the narrowness of the restraint on First Amendment expression which Section 399 created. As construed by the Federal Communications Commission,³⁸ and as intended by Congress,³⁹ Section 399 does not pro-

³⁶ 113 Cong. Rec. 26394 (1967).

³⁷ There are several ways in which the federal government could pressure public broadcasting stations to adopt an editorial viewpoint favorable to the government's interest. For example, the Federal Government could utilize the licensing process which is "itself . . . potential source of federal coercive power over all broadcasters" to pressure public stations into editorializing in favor of the government's interests, or at least, not against the government's interests. See *League of Women Voters of California v. F.C.C.*, 547 F.Supp. at 388.

³⁸ Accuracy in Media, *supra* note 4, at 45 F.C.C. 2d at 301.

³⁹ *Supra* note 26.

hibit public stations from editorializing as that activity is commonly understood. They may "introduce opinion into the reporting of facts."⁴⁰

Section 399's prohibition of editorializing means only that public stations may not broadcast editorials "representing the opinion of the management of such station."⁴¹ Public stations are otherwise free to editorialize and it was Congress' intent that, regardless of Section 399, public stations should broadcast "balanced, fair and objective presentations of controversial issues."⁴²

There are compelling reasons why no narrower restriction is possible. To begin with, the only constitutional method available to Congress to prevent public stations from becoming "vehicles for the promotion of one or another political cause or candidate"⁴³ was to prohibit public stations from endorsing any editorial viewpoint as their own. Other alternatives for achieving this end would have resulted in restrictions clearly offensive to the First Amendment. For example, if Congress had allowed public stations to endorse certain viewpoints as their own, but found it necessary to prohibit endorsements which were "too political" or "unbalanced", enforcement of the prohibition would certainly be ruled unconstitutional as either an impermissible content regulation or prior restraint. Notably, these are the same constitutional problems that will arise if this Court finds the prohibition on public stations adopting an editorial viewpoint unconstitutional as discussed below. Therefore, due to the narrowness of Section 399's restraint on editorial freedom, and because of the unavailability of other effective or constitutional methods of protecting public stations from economic pressure or preventing them from

⁴⁰ Webster's New Collegiate Dictionary (1978).

⁴¹ *Supra* notes 38, 39.

⁴² *Supra* note 26.

⁴³ *Supra* note at 25.

endorsing political candidates in violation of the other provision of Section 399, the prohibition of "editorializing" is no greater than is essential.

d. The Section 399 Prohibition Of "Editorializing" Is Within The Constitutional Power Of The Government

Congress has broad and sweeping power to regulate broadcasting as part of its authority over interstate and foreign commerce.⁴⁴ In order to regulate broadcasting, Congress created the Federal Communications Commission, an independent federal regulatory agency, and charged it with licensing the use of the airwaves.⁴⁵ The legitimacy of the FCC's regulation of broadcasters has been upheld by the Court on numerous occasions.⁴⁶ The Section 399 prohibition against the endorsement by public stations of editorial viewpoints is one small part of the court upheld regulatory framework Congress has created for broadcasting and is therefore within the constitutional power of the government.

e. Section 399's Prohibition Against Public Stations Adopting An Editorial Viewpoint As Their Own Is Constitutional

In light of this Court's determination that the constitutionality of regulations which incidentally restrain First Amendment expression should be analyzed under the type of test established in *United States v. O'Brien*, and because the Section 399 prohibition of "editorializing" satisfies all the *O'Brien* criteria, it is apparent that the prohibition is constitutional.

⁴⁴ U.S. Const. art. I, § 8, cl. 33.

⁴⁵ See *Red Lion*, 395 U.S. at 379, 394.

⁴⁶ *Id.* at 394; See also *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943); *Regents of University System of Georgia v. Carroll*, 78 Ga. App. 292, *aff'd* 338 U.S. 586 (1950).

C. BECAUSE EDITORIALS MAY BE CONSTRUED AS SUPPORT FOR OR OPPOSITION TO CANDIDATES FOR POLITICAL OFFICE, A NUMBER OF CONSTITUTIONAL AND PRACTICAL DIFFICULTIES WILL ARISE IF PUBLIC BROADCASTING STATIONS ARE ALLOWED TO "EDITORIALIZE"

1. It Is Impossible To Draw A Distinction Between The Endorsement Of Editorial Views and Support For, Or Opposition To, A Political Candidate

Section 399, as amended in 1981⁴⁷ provides: "No non-commercial educational broadcasting station which receives a grant from the Corporation [for public broadcasting] under Subpart C of this Part may engage in editorializing. No noncommercial educational broadcasting station may support or oppose any candidate for political office."

The first provision in Section 399 prohibits public broadcast stations receiving CPB funding from endorsing an editorial viewpoint. The second provision of the section prohibits *all* public stations from supporting or opposing a candidate for political office. Notably, only the constitutionality of the prohibition against "editorializing" is presently before this Court; the prohibition against support for or opposition to candidates for political office will remain in force regardless of the outcome of this litigation.

If the lower court decision is upheld, either Congress or the Federal Communications Commission will be faced with the impossible task of fashioning a test that distinguishes between permissible editorials and editorials which are, in reality, partisan because they so closely reflect a particular candidate's platform. The impossibility of this task stems from the fact that "[t]he editorial

⁴⁷ 47 U.S.C. §399 (Supp. 1983) (amending 47 U.S.C. §399 (1980)).

process is inherently subjective . . . [and a] decision appearing to some persons as serving the 'public interest' may well appear to others as 'political'."⁴⁸ The application of such a test will involve the government in control over the content of editorials and such control has consistently been found to be abhorrent to the First Amendment.⁴⁹

Aside from this constitutional problem, litigious candidates and their election committees will petition the FCC for cease and desist orders against editorials by public stations which appear to support or oppose particular candidates. Candidates already regularly petition and sue the FCC for equal time on the air.⁵⁰ The Federal Election Commission is also petitioned by candidates for injunctions because even issue advertisements supporting or opposing certain political views could be considered "contributions" or "negative contributions" in violation of the Federal Election Campaign Act.⁵¹ See, e.g., *In the Matter of Mobil Oil Corporation*, MUR 319(76). Therefore, it is reasonable to believe that the FCC will be asked to enforce Section 399's prohibition of public broadcast stations supporting or opposing political candidates when such stations have engaged in the apparently permissible form of editorializing.

Should the FCC become involved in content regulation and determine that a public station's editorials do support one candidate over another, it may order that equal time be allotted to the aggrieved candidate for rebuttal.

⁴⁸ *Muir v. Ala. Educational Television Comm.*, 656 F.2d 1012, 1023 (5th Cir. 1981), *aff'd on rehearing* 688 F.2d 1033 (5th Cir. 1982), *cert. denied*, — U.S. —, 103 S.Ct. 1274 (1983).

⁴⁹ *Supra* note 6.

⁵⁰ See, *Kennedy for President Comm'n. v. F.C.C.*, 636 F.2d 417 (D.C. Cir. 1980); *CBS, Inc. v. FCC*, 629 F.2d 1 (D.C. Cir. 1980), *aff'd*, 453 U.S. 367 (1981).

⁵¹ 2 U.S.C. § 441b.

The FCC may threaten to revoke the station's license if it does not comply with the equal time order.⁵² Compliance with such an FCC order will impose a high cost on public stations by absorbing some portion of their broadcasting hours which could otherwise be spent airing cultural and educational programs. In addition to becoming targets of administrative proceedings during elections, candidates will seek injunctions by directly suing public stations which allegedly violate Section 399 by indirectly supporting and/or opposing candidates. Defense of such suits will undoubtedly deplete public stations' limited finances.

The judiciary will be repeatedly called upon to determine whether a particular editorial is too "political" to be allowed under Section 399. Appeals from administrative attempts to fashion a workable distinction between permissible and impermissible editorials will "necessarily involve unacceptable and undesirable judicial intrusion [in] the editorial process."⁵³ This conversion of "courts into super editors"⁵⁴ would be unconstitutional because courts may not "dictate to the press [or other media] . . . the slant of its editorials." *Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241, 262 (1974). (White J. concurring). Nevertheless, such a conversion of courts into "super editors" is a predictable and not speculative result of allowing public broadcasting stations to "editorialize."

⁵² 47 U.S.C. §312(a) (7).

⁵³ Muir, 656 F.2d at 1023.

⁵⁴ *Id.*

2. The Fairness Doctrine Is Not Sufficient To Assure The First Amendment Rights Of The Public To Balanced Programming As The Lower Court Believed Nor Will It Prevent Undue Influence On And By The Public Broadcaster.

The lower court's apparent confidence that the Fairness Doctrine⁵⁵ will assure the presentation of balanced viewpoints if public broadcast stations are allowed to "editorialize" was based merely on the judge's erroneous beliefs.⁵⁶ There are two major errors in assuming the Fairness Doctrine alone will provide for the presentation of balanced viewpoints on public broadcast stations. First, there is an important distinction between presenting views and endorsing views. Once the public broadcaster has endorsed a position, there will be a danger that the position will be perceived by the public as either approved by the government, or as a statement of the government's position. The Fairness Doctrine will not eliminate this danger.

Secondly, the realities involved in the application of the Fairness Doctrine dictate that the broadcast licensees have virtually complete discretion "to determine what issues should be covered, how much time should be allocated, which spokesman should appear, and in what format."⁵⁷ Consequently, the Fairness Doctrine does not, in any sense, require broadcast licensees to allow other

⁵⁵ In the Matter of Editorializing By Broadcast Licensees, 13 F.C.C. 1246 (1949); Applicability of Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 *Fed. Reg.* 10415 (1964). See also, 47 U.S.C. §315(a).

⁵⁶ League of Women Voters, 457 F.Supp. at 386.

⁵⁷ Notice of Inquiry: The Handling of Public Issues Under the Fairness Doctrine and the Public Interest of the Communications Act, 30 F.C.C. 2d 26, 27-28 (1971).

persons to express their opinions over the licensees' facilities.⁵⁸

The lower court was obviously confusing the Fairness Doctrine principles with the Commission's "personal attack" and "political editorializing" rules which were upheld in *Red Lion*, 395 U.S. 367 (1969).⁵⁹ These provisions are distinguishable from the Fairness Doctrine provisions because the Fairness Doctrine provisions do not provide any limited right to the airwaves. Rather, they only require that the licensee present opposing views on controversial issues of public importance at some point in its *overall* programming.⁶⁰ Therefore, as Justice Brennan, with whom Justice Marshall concurred, noted in a dissenting opinion in *Columbia Broadcasting System*:

Broadcasters may meet their fairness responsibilities through presentation of carefully edited news programs, panel discussions, interviews, and documentaries. As a result, broadcasters retain almost exclusive control over the selection of issues and viewpoints to be covered, the manner of presentation, and perhaps most important, who shall speak. I can only conclude that the Fairness Doctrine, standing alone, is insufficient—in theory as well as in practice—to provide the kind of "uninhibited,

⁵⁸ The Fairness Doctrine must be distinguished from the "equal time" requirement which provides that when one political candidate is given air time, other candidates for the same office must be given equal time.

⁵⁹ 47 CFR §73.121. The personal attack rule essentially provides that when an "attack" is made on a person's character, he must be notified by the broadcaster and be given an opportunity to respond. The political editorializing rule generally provides that the endorsement of a candidate creates the necessity of offering other candidates an opportunity to respond.

⁶⁰ See *supra* n. 55.

robust, and wide-open" exchange of views to which the public is constitutionally entitled.⁶¹

Even in those very rare instances where the Federal Communications Commission finds that a broadcaster acted unreasonably, in bad faith, or both,⁶² it will direct the broadcaster to meet its fairness obligations through additional programming, but the type of programming will not be specified by the Commission and is left to the discretion of the broadcaster.⁶³

It should also be noted that there have been strong and persistent attempts to eliminate all or part of the Fairness Doctrine. For example, Congress has proposed legislation to eliminate the Fairness Doctrine,⁶⁴ and the FCC has endorsed legislation that would eliminate the Fairness Doctrine.⁶⁵ Similarly, the FCC has recently adopted a

⁶¹ 412 U.S. 94, 186-187.

⁶² Former Commission Chairman Ferris estimated that the FCC receives about 5,000 fairness complaints and inquiries each year. Of these, 97 percent required no license response, so the FCC did not even alert the licensee involved of the existence of the complaint. According to Ferris, in an average year only 15-20 complaints are resolved in a manner unfavorable to the broadcasters. First Amendment Clarification Act of 1977: Hearings on S.22 before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation, 95th Cong., 2d Sess. 19 (1978) (statement of Charles D. Ferris, Chairman FCC); See also, *American Security Council Educational Foundation v. FCC*, 607 F.2d 438 (D.C. Cir. 1979) *cert. denied* 414 U.S. 1013 (1980), wherein Judge Wilkey, with whom Judges McKinnon and Robb joined in dissenting, indicated that it may be virtually impossible to prove a Fairness Doctrine complaint because of the requirement of *prima facie* evidence necessary to sustain the complaint. 607 F.2d at 475.

⁶³ See *supra* n. 55.

⁶⁴ H.R. 4780, 97th Cong., 1st Sess. (1981); H.R. 4781, 97th Cong., 1st Sess. (1981).

⁶⁵ See, e.g., Letter from Mark S. Fowler, Chairman, Federal Communications Commission to the Vice President, United States Senate (Oct. 2, 1981) (discussing FCC proposals to eliminate Section 315).

Notice of Proposed Rule Making concerning the repeal or modification of the personal attack and political editorial rules.⁶⁶ This action is in response to a petition by the National Association of Broadcasters alleging that these provisions inhibit the presentation of controversial programming. Therefore, it is possible that the Fairness Doctrine may soon be extinct, or at least severely emasculated. The broadcasters, therefore, would have clearly "preferred" First Amendment rights and a virtual monopoly on what would be aired.⁶⁷

In light of these practical limitations of the Fairness Doctrine and the likelihood that the Doctrine may soon be eliminated, it is apparent that the lower court's confidence that the Doctrine will somehow ensure the balanced presentation of editorials and eliminate the danger of public broadcast station "editorials" being perceived as statements of governmental viewpoints was unjustified.

⁶⁶ Notice of Proposed Rule Making, In the Matter of Repeal or Modification of Personal Attack and Political and Editorial Rules, FCC Gen. Docket No. 83-484, adopted June 2, 1983.

⁶⁷ The Public Broadcasting Act does not provide any assurances of balanced programming either. In *Accuracy in the Media, Inc.*, 521 F.2d 288 (D.C. Cir.): *cert. denied*, 425 U.S. 934 (1975), the Court considered the question of whether the FCC had jurisdiction to enforce against the CPB Section 396(g)(1)(A) which states that objectivity and balance should be encouraged. The Court stated that the provision "is not a substantive standard, legally enforceable by the agency or the courts." 521 F.2d at 297. The Court went on to state that the wording of the section supports this view, and that CPB is not required to provide programs with "strict adherence to objectivity and balance" but rather to "facilitate the full development of educational broadcasting in which programs... will be made available..." The Court therefore held that the FCC has no function in this scheme of accountability established by §396(g)(1)(A) and the 1967 Act in general other than that assigned to it by the Fairness Doctrine. *Id.* at 297.

III. CONCLUSION

For all of the above-stated reasons in the foregoing *amicus curiae* brief, the decision of the District Court should be reversed.

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ALEXANDER L. STEVAK,
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No. 82-912

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1982

FEDERAL COMMUNICATIONS COMMISSION,

Appellant

v.

LEAGUE OF WOMEN VOTERS OF
CALIFORNIA, ET AL.,

Appellees

On Appeal from the
United States District Court
for the Central District of California

BRIEF OF AMICUS CURIAE
NATIONAL BLACK MEDIA COALITION

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QUESTION PRESENTED

Does the provision of Section 399 of the Communications Act that prohibits editorializing by noncommercial educational broadcasting stations that receive grants from the Corporation for Public Broadcasting (CPB) violate the First Amendment?

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IN THE SUPREME COURT
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Federal Communications Commission,

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On Appeal from the
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BRIEF OF AMICUS CURIAE
NATIONAL BLACK MEDIA COALITION

STATEMENT OF THE CASE

Amicus Curiae adopts the Appellee's
Statement.

INTEREST OF AMICUS CURIAE

The National Black Media Coalition (NBMC) is a membership organization of individuals and group affiliates around the country who have joined together to assert the needs and interests of America's substantial Black population in legal and policy matters regarding communications. It has appeared in many cases before the Federal Communications Commission (FCC) and the courts to vindicate the public's interest in obtaining maximum diversity of information sources, and to facilitate the expression of minority points of view to mass audiences.

We believe that the interests of the substantial Black population, and of audiences generally, weigh heavily in favor of the lower court's finding that Section 399's ban on certain editorializing is violative of the First Amendment.

SUMMARY OF ARGUMENT

In any balance of First Amendment interests, the public's right to receive access to diverse views and voices is paramount. Where the Government restricts speech, its actions must be narrowly tailored to achieve a compelling governmental interest. In this case, the governmental interests are un compelling, and the means to achieve its goals are both overly broad and ineffective.

Access to additional editorial voices is particularly important to minority audiences, who are not as well served by commercial radio and television as majority audiences are. Additional voices in the marketplace of ideas -- particularly voices not subject to conventional advertiser pressures -- increase the likelihood that issues of concern to minority audiences will be aired. NBMC urges the Court to weigh

heavily in its balance the audience's paramount First Amendment rights to a free and open marketplace of ideas.

When First Amendment analysis is applied to Section 399, it fails virtually every test. The governmental aims are at best unconvincing, since they are vague, speculative and suspect. The heavy-handed means Congress chose to meet its aims are ineffective and overly broad at the same time. They certainly are not "narrowly tailored." And they are more restrictive of First Amendment rights than other alternatives such as segregating government funds or mandating by law that the content of editorials could not enter into governmental funding decisions. Censorship of important voices should be the last resort to a significant and serious problem, not an easy tool for stifling criticism of the status

quo or opposition to the incumbents' reelection.

Finally, NBMC cautions against a decision in this case that might jeopardize other provisions of the Communications Act relating to public broadcasters. In requiring equal employment opportunities and community advisory boards, Congress is not suppressing speech as it does directly in Section 399. NBMC urges, then, a narrow decision affirming the lower court.

ARGUMENT

I. THE COURT BELOW CORRECTLY FOUND
SECTION 399's BAN ON EDITORIALIZING
TO BE VIOLATIVE OF THE FIRST
AMENDMENT.

A. The First Amendment Rights of the
Public, and Particularly Minority
Segments, Are Impinged by Govern-
ment Suppression of the Editorial
Voices of Certain Noncommercial
Educational Broadcast Stations.

The National Black Media Coalition's starting point in the consideration of First Amendment interests in broadcasting, where there is only a limited number of governmental licenses, is this Court's statement in Associated Press v. United States, 326 U.S. 1, 20 (1945), that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of

the public. . . ."

Consistent with this view, the FCC has adopted many policies and rules aimed at increasing the number of voices available to local audiences over the airwaves. In adopting multiple ownership rules in 1970, for example, the Commission held to the view that "60 different licenses are more desirable than 50, and even that 51 are more desirable than 50." Multiple Ownership, First Report and Order (Dkt. 18110), 22 F.C.C.2d 306, 311 (1970).

This doctrine of diversity is most important to minority audiences. Almost by definition, minority audiences are the last to be served by a system of limited entry and licensing. That is, where there are only a few competing stations in a given market, they are most likely

to serve majority audiences.^{1/} As more stations enter the market, there is a greater opportunity for and likelihood of programming service aimed at minority audiences. Thus, NBMC has consistently championed laws, rules and policies that open entry into the broadcast marketplace -- new and diverse sources to express divergent viewpoints. Conversely, we oppose efforts to stifle the relatively few voices licensed to operate broadcast stations, at least where such restrictions are not necessary to enhance the opportunities for other, non-licensees to express their opinions over the air-waves.^{2/}

^{1/} See, e.g., Beebe & Owen, "Alternative Structures For Television," (OTP Staff Paper, 1972), reprinted in D. Ginsburg, Regulation of Broadcasting (1978), at 324-25.

^{2/} Thus, NBMC has favored application of the Fairness Doctrine to broadcasting. See Red Lion Broadcasting Corp. v. FCC, 395 U.S. 367 (1969).

While individuals do not have a right of access to speak over broadcast stations, CBS v. Democratic National Committee, 412 U.S. 94 (1973), audiences do have a right "to receive suitable access to social, political, esthetic, moral, and other ideas and experiences. . . ." Red Lion, supra note 2, 395 U.S. at 390. It is this paramount interest of the audience which we assert here is served by declaring Section 399's ban on editorializing unconstitutional.

The voices of noncommercial educational stations subject to the censorship of Section 399 could contribute in several ways to the public's right to diverse information sources.

First, any additional voice presents the greater likelihood of new information entering the marketplace of ideas. As the number of stations increase, one (or more) of the stations -- whether a

noncommercial station or a commercial one in the same market -- is more likely to address minority problems or issues.

Fifty-one voices are better than fifty.

Second, noncommercial stations are not subject to pressures from advertisers, actual or perceived, not to cover certain controversies.^{3/} As the Carnegie Commission on the Future of Public Broadcasting recognized in its report, A Public Trust (1979), at 25, ". . . public broadcasting creates programs to serve the needs of audiences, not to sell products or to meet the demands of the marketplace. This ideal demands that public television and radio attract viewers and listeners whose tastes and

^{3/} See, e.g., Fang & Whelan, Survey of Television Editorials and Ombudsman Segments, 17 J. Broadcasting 363, 367 (1973) (many stations avoid editorials so as not to offend advertisers); Quaal & Brown, Broadcast Management (1976), at 356.

interests are significant, but neglected or overlooked by media requiring mass audiences." Noncommercial stations can thus be expected to provide different and additional viewpoints on some subjects from those stations subject to commercial pressures.^{4/}

Third, if the purpose of educational broadcasting is to educate and inform, then responsible editorializing, subject to the Fairness Doctrine, can be an

^{4/} To a certain extent minorities are further disserved by the commercial broadcast system than most other components of the general audience. In commercial broadcasting, audiences are the product sold by the thousands to advertisers, who are the consumers (of audiences supplied by the broadcaster). Advertisers look for audiences that are affluent and likely to buy their products. The poor, minority, elderly or rural audiences are often demographically undesirable. Thus broadcasters are not anxious to serve such audiences, since to do so lessens the attractiveness of their product to advertisers. See generally Brown, Television -- The Business Behind the Box (1971).

important addition to a station's overall educational fare.

Fourth, editorializing raises new issues to the public agenda. It spotlights issues which might otherwise be ignored by the general public. In this way it is an important supplement to the Fairness Doctrine, which (with but one case exception)^{5/} provides only for programs to balance issues already raised. Red Lion, supra note 2, 395 U.S. at 369. In fact, the Fairness Doctrine, from the beginning, has been premised on a broadcaster's ability to editorialize. Report on Editorializing by Broadcast

^{5/} In Patsy Mink (WHAR), 59 F.C.C.2d 987 (1976), the Commission sanctioned a station for its failure to cover a "burning issue" initially. This is the only instance of the FCC's enforcing the affirmative part of the doctrine to cover controversial issues. See generally Kurnit, Enforcing the Obligation to Present Controversial Issues: The Forgotten Half of the Fairness Doctrine, 10 Harvard Civ. Rts. Civ. Lib. L. Rev. 137 (1975).

Licensees, 13 F.C.C. 1246 (1949).^{6/}

In addition, as the Commission has deregulated in radio, and is proceeding to do so in television, it has discarded its "ascertainment" procedures. See Office of Communication of the United Church of Christ v. FCC, 707 F.2d 1413, 1419, 1435 (D.C. Cir. 1983). This process required licensees to ascertain local needs and problems and to program responsively to those issues. These procedures generally helped in the airing of issues of particular concern to minorities -- many of which would likely have been ignored otherwise. As these procedures are abolished, it is more important for audiences to have access to as many

^{6/} In WHDH, 16 F.C.C.2d 1, aff'd sub nom. Greater Boston Broadcasting Co. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971), the Commission placed a slight demerit on the incumbent licensee in a comparative hearing for its failure to editorialize.

different voices as possible, in the hope that minority issues, needs and problems will be addressed at least by some.

Finally, the relatively few minority-controlled noncommercial broadcast stations are extremely important voices in minority communities. Blacks, Hispanics, Asians, and American Indians, who comprise approximately 20% of the United States population, control fewer than 2% of the nation's broadcast outlets.^{1/} Approximately 13% of those very few stations are noncommercial. Thus, while any denial of editorial voices is significant to minorities, the denial of 13% of the minority-controlled voices is even more significant, in view of their disproportionately few outlets nationwide.

^{1/} See, e.g., Honig, "Relationships Among EEO, Program Service and Minority Ownership in Broadcast Regulation," in Gandy, ed., Proceedings from the Tenth Annual Telecommunications Policy Research Conference (1983).

In sum, NBMC urges the Court to consider strongly the listeners' interests in maximizing diverse voices in the necessarily limited scheme of broadcast regulation. As we have shown, the First Amendment interests of minority audiences are particularly affected by Section 399. Additional voices are needed in the marketplace, and we believe that stations subject to the ban of 399 are more likely than not to raise issues of import and concern to minority audiences.

We turn now to an analysis of these various concerns and interests in applying the First Amendment to the statute in issue in this case.

B. Congress' Suppression of the
Editorial Voices of Certain
Broadcasting Stations Is Unneces-
sary to Achieve a Compelling
Governmental Interest.

This Court repeatedly has emphasized that in order to interfere with the exercise of a fundamental right, the Government must demonstrate a compelling state interest and a narrowly-tailored restriction designed to protect that interest.^{8/} As we show below, the interest asserted to justify the Government's editorial ban is (1) vague and speculative, (2) outweighed by other, strongly-accepted governmental interests in the broadcasting field, and (3) both

^{8/} See Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530 (1980); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978); Community-Service Broadcasting of Mid-America v. FCC, 593 F.2d 1102 (D.C. Cir. 1978) (en banc).

underinclusive and overly broad in trying to achieve the professed interest.

1. The Government's Interest in
Banning Certain Editorializ-
ing Is Uncompelling.

The stated Congressional interest in enacting Section 399 was to prevent noncommercial broadcasting stations from becoming "mouthpieces" for the Government. This is dubious, however, in light of the legislative history showing Congressional fear of opposition to incumbents.^{9/} In addition, the professed goal is overly vague. What constitutes the

^{9/} The House debate on the 1967 Public Broadcasting Act focused on some Congressmembers' fears that editorials might harm them politically. As one example, Representative McClure worried that if noncommercial broadcasters were given the right to editorialize, they might be "crusad[ing] for [his] opponent in next year's election." 113 Cong. Rec. 26391 (1967).

Government? Is it the President? If so, there appears to be no possibility of undue influence as the President does not disburse CPB funds. Is Congress "the Government"? Again, there is no danger as Congress is a diverse group unlikely to hold a single opinion on any controversial issue.

Even if the ambiguous Congressional motive is accepted, it is pure speculation whether noncommercial broadcasting stations will become Government mouthpieces. The lower court correctly deduced that this fear is unjustified.^{10/} Section 399 is aimed at hundreds of diverse stations that will not agree on all issues. As we explain above, NBMC is more concerned that the ban stifles important discussion than

^{10/} League of Women Voters of California v. FCC, 347 F.Supp. 370, 385 (C.D. Cal. 1982) (J.S. App. at 14a-15a).

that there may be some purely hypothetical chance that a broadcaster will become a mouthpiece for the Government. The ground is simply unconvincing.

2. The Governmental Interest
Asserted Is Outweighed by
Other, Overriding Interests
in Promoting a Marketplace of
Ideas.

The purpose of the First Amendment is to "preserve an uninhibited marketplace of ideas. . . ."^{11/} In a free society, there is a strong governmental interest in enhancing speech, yet Section 399 strikes down the number of voices that

^{11/} Red Lion Broadcasting Co. v. FCC, supra, 395 U.S. at 390 (1969). In FCC v. Nat'l Citizens Committee for Broadcasting, 436 U.S. 775, 801-02 (1978), the Court recognized "diversity of information heard by the public without ongoing government surveillance of the content of speech" as a legitimate "governmental interest" in First Amendment analysis.

can be heard over the airwaves. The American public relies on broadcasting stations for access to ideas and information. Yet by prohibiting hundreds of diverse noncommercial stations from editorializing, Section 399 significantly limits the viewpoints to which the public is exposed. As explained in Section A above, this limitation works particularly to the detriment of minority audiences who most need First Amendment protection.

Furthermore, because the penalties are so severe for violation of the editorializing ban of the Communications Act -- including nonrenewal or revocation of license under 47 U.S.C. §§ 309, 312, or a significant jail term and fine under 47 U.S.C. § 501 -- this statute may chill other, non-editorial speech. Broadcasters may fear to express themselves or may misunderstand what technically constitutes "editorializing." Again, the

listener's interest and the governmental interest in free flow of information is defeated by the statute.

3. The Statute Is Neither
Narrowly Tailored to Meet Its
Objective, Nor Is It Reason-
ably Effective in Preventing
the Perceived Harm.

Where First Amendment rights are involved, the means created to achieve a conflicting governmental goal must be precisely tailored.^{12/} Since Section 399 does not achieve its purposes, despite its severe restraints on editorial discretion, it cannot meet this "narrowly tailored" test.

(a) If noncommercial broadcasting licensees agree with Congressional or

^{12/} Nebraska Press Association v. Stuart, 427 U.S. 539 (1976).

Presidential stands on particular issues, they (like their print media colleagues) should have the right to express that agreement. Opposing opinions are guaranteed presentation through the Fairness Doctrine. Section 399 is unnecessary to ensure that the public hears ideas and positions opposing the Government.

(b) Furthermore, by censoring only overt editorials, in which the licensees truthfully state their partisanship, Section 399 will not succeed in eliminating all editorial comment by noncommercial stations subject to the ban.

Section 399 applies only to editorializing by noncommercial stations -- not to other types of programming. Indeed, the Government admits that Congress does not want to restrict controversial or political programs. (FCC Br. at 41.)

Yet the FCC has noted that editorial expressions occur in a variety of forms,

-ranging from the overt statement of position by the licensee in person or by his acknowledged spokesmen to the selection and presentation of news editors and commentators sharing the licensee's general opinions or the making available of the licensee's facilities, either free of charge or for a fee to persons or organizations reflecting the licensee's viewpoint either generally or with respect to specific issues. 13/

Obviously, it is preferable that a licensee's personal opinion clearly be stated as such than that it appear more subtly as part of regular programming. As the FCC has emphasized, "the [p]ublic has less to fear from the open partisan than from the covert propagandist."14/

(c) The Government asserts that Section 399 is not overly-restrictive as

13/ Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1252 (1949).

14/ Id., 13 F.C.C. at 1254.

it permits station employees, academics, experts and others to express the station's opinion. (FCC Br. at 41.) But, as Justice Blackmun correctly noted in his concurrence in Regan v. Taxation With Representation,^{15/} "it hardly answers one person's objection to a restriction on his speech that another person, outside his control, may speak for him."^{16/} The public is best served when arguments are presented by those "who actually believe them; who defend them in earnest, and do their very utmost for them."^{17/}

(d) Finally, if the true governmental goal is to prevent broadcasting stations that receive governmental aid from

^{15/} Regan v. Taxation With Representation of Washington, 51 U.S.L.W. 4583 (May 23, 1983).

^{16/} Id., U.S.L.W. at 4587.

^{17/} J. Mill, On Liberty 32, cited with approval in Red Lion, supra note 2, 395 U.S. at 392 n.18.

becoming propaganda tools, there is no justification for applying the ban only to noncommercial stations. Commercial stations are dependent upon the government for their very valuable licenses. These free licenses can be worth over \$200 million, and are negative governmental subsidies to those who receive them.^{18/} Because broadcast licenses are not automatically renewed, the potential loss of a valuable broadcasting license is a much greater threat to create governmental mouthpieces than limited government funding of public broadcasters. Yet there has been no adequate explanation as to why the Government has singled out noncommercial licensees for the editorial ban.

^{18/} See, e.g., Gottfried v. FCC, 655 F.2d 297, 312 n.55 (D.C. Cir. 1981), rev'd on other grounds sub nom. Community Television of Southern California v. Gottfried, ___ U.S. ___, 103 S.Ct. 885 (1983).

4. There Are Less Restrictive
Means to Accomplish the
Government's Professed Goal.

Although the current safeguards outside Section 399 fully protect noncommercial broadcasters from government influence,^{19/} alternative restrictions are available that will not interfere with the First Amendment.

a. Segregation of funds.

Congress might require that no governmental funds be used to produce editorials. Noncommercial broadcast stations currently are required to

^{19/} E.g., the Corporation for Public Broadcasting (CPB), an independent, non-profit corporation responsible for disbursing funds to noncommercial stations, is sufficiently insulated from political concerns. CPB board members are appointed by the President, with the advice and consent of the U.S. Senate for six-year terms, and with other safeguards to guard against governmental influence. 47 U.S.C. §§ 396(c) and (f).

maintain certain records and undergo annual audits, so this suggestion is easily implemented. Just as the Court in Regan v. Taxation With Representation suggested that TWR could establish two separate corporations,^{20/} noncommercial broadcasters could establish two separate accounts -- one for general operations and another for producing and presenting editorials. This solution is further supported by the Court's discussion in Consolidated Edison v. Public Service Commission, 447 U.S. 530 (1980). In that case, the Court ruled that the Commission could not prohibit public utilities from including controversial inserts in their billing envelopes. The Court suggested that the utility company could allocate the costs of producing the controversial

^{20/} Regan, supra note 15, 51 U.S.L.W. at 4584.

inserts to its shareholders so that the ratepayers would not be subsidizing the speech.^{21/}

b. Content-neutral criteria
for funding.

Another narrowly-tailored means to achieve Congress' goal is to mandate purely objective standards for the CPB to follow in disbursing funds. Although this already appears to be the case, Congress could further specify that no funding decisions shall be determined in any way by how an applicant editorialized on any issue. In that way, stations would have no incentive to use their editorials to curry favor.

Indeed, independence from government-al domination is a requirement for FCC

^{21/} Consolidated Edison, supra
note 8, 447 U.S. at 543.

license renewal. As explained in Citizens Communications Center v. F.C.C.,

the failure to promote the full exercise of First Amendment freedoms through the broadcast medium may be a consideration against license renewal. Unlike totalitarian regimes, in a free country there can be no authorized voice of government. Though dependent on government for its license, independence is perhaps the most important asset of the renewal applicant. 22/

In sum, Section 399 does not meet the stated government goal. Instead, it violates the First Amendment by limiting the public's right to receive valuable and needed information. There is no justification for treating noncommercial stations that accept funds from the insulated CPB differently from commercial stations that are dependent upon the government for their valuable licenses.

22/ Citizens Communications Center v. FCC, 447 F.2d 1201, 1214 (D.C. Cir. 1971).

As the court succinctly stated in Community-Service Broadcasting of Mid-America, Inc. v. FCC, 593 F.2d 1102, 1110 (D.C. Cir. 1978) (en banc): "Clearly the existence of public support does not render the licensees vulnerable to interference by the federal government without regard to or restraint by the First Amendment. . . ."

The statute is not narrowly tailored to achieve its purpose and its ends are not compelling under all the circumstances and safeguards inherent in public broadcasting.

II. IN CONSTRUING SECTION 399, THE COURT
NEED NOT ADDRESS OR RULE ON OTHER
PROVISIONS OF THE COMMUNICATIONS ACT
WHICH PLACE OBLIGATIONS ON NONCOM-
MERCIAL STATIONS.

The statute at issue in this case is aimed specifically at suppressing the editorial voices of noncommercial broadcasters. It thus must undergo the strictest form of scrutiny from the courts and require a most compelling justification. As we set forth above, the statute is unconstitutional.

In contrast, however, are the provisions of the Act which require noncommercial broadcasters to adopt procedures designed to encourage affirmative action in employment and for community involvement, 47 U.S.C. §§ 398(b)(1) and 396(k)(9)(A) (1982 Supp.). These provisions are not directly suppressive of the broadcasters' speech; indeed, where there

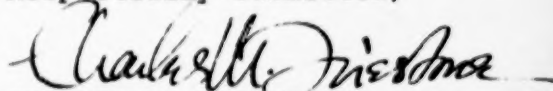
is any relationship to programming at all, they are designed to enhance the free speech rights of the public.

Certainly these provisions are not in issue in this case, and therefore are not before the Court. Nevertheless, NBMC respectfully draws the Court's attention to them in the hope that, in affirming the lower court, this Court does not sweep too broadly. Provisions in the Communications Act prescribing duties for broadcasters do not contravene the First Amendment where they are not direct bans on certain voices or specific content.

CONCLUSION

For the foregoing reasons, Amicus Curiae National Black Media Coalition respectfully urges the Court to affirm the court below.

Respectfully submitted,



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NATIONAL ASSOCIATION OF
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IN SUPPORT OF APPELLEES,
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INTEREST OF *AMICI CURIAE*

The Public Broadcasting Service ("PBS") and the National Association of Public Television Stations ("NAPTS") submit this brief *amicus curiae* in support of Appellees, League of Women Voters of California, *et al.* PBS and NAPTS are both private, nonprofit, membership corporations organized under the laws of the District of Columbia. Each is governed by a Board of Directors elected by its members, which are the licensees of noncommercial educational, or public, television stations located throughout the United States and its territories. Neither PBS nor NAPTS has any structural ties to the Corporation for Public Broadcasting ("CPB") or any government

agency. Substantially all of the services provided by each organization are paid for by the member stations. Each may also receive corporate and foundation contributions, as well as specific project grants and contracts from CPB and others.

NAPTS was established by public television stations to perform national representational functions on their behalf. NAPTS provides an organizational framework for public television stations to coordinate their activities in non-programming areas. Its activities include research, planning, and representation of the interests of public television stations before Congress, federal agencies, CPB, and the courts.

Thus, NAPTS has a vital interest in seeing that its members are freed from the unconstitutional burden that Section 399 of the Communications Act of 1934, as amended, 47 U.S.C. § 399 (Supp. V 1981) ("Section 399") imposes on their First Amendment rights. That Section prohibits any noncommercial educational broadcasting station which receives CPB funding from expressing the opinion of the licensee or station management on any issue, whether partisan or not, from drunk driving to urging people to vote. Not only does this impermissibly limit public broadcasters' participation in the debate on such issues, but it deprives the public of a significant voice on matters of local concern.

PBS was established by public television stations to operate distribution facilities that interconnect the local stations by satellite and enable them to share programming on a national basis.¹ Although PBS assists its mem-

¹ PBS stands for Public Broadcasting Service, not Public Broadcasting System, as the briefs for the government and *amicus curiae* Mobil Corporation mistakenly call it. Brief for the United States at 14 & n.23 (hereinafter cited as "Gov't Brief"); Brief of Amicus Curiae Mobil Corporation at 3. The name Public Broadcasting Service was chosen to underscore that PBS is not a network dictating program choices for affiliates, but an organization created to fill the service needs identified by its members.

bers to acquire, schedule, publicize, promote, and distribute programming, its Articles of Incorporation bar it from producing any programming or from owning and operating a broadcast station. Each member station retains the absolute right to determine whether and when to broadcast any program distributed by PBS, and PBS is but one of many programming sources for the stations. Thus, "public broadcasting" remains a collection of autonomous and fiercely independent local stations.

As a provider of programs to public television stations, PBS has a vital interest in ensuring that those stations enjoy the same programming discretion accorded other broadcasters licensed by the Federal Communications Commission ("FCC"). PBS has participated *amicus curiae*, on behalf of its member stations, before numerous courts in defense of fundamental First Amendment principles.

SUMMARY OF ARGUMENT

The government's argument that Section 399 is justified by some special obligation imposed on public broadcasters by their receipt of CPB funds reflects a fundamental misunderstanding of the federal government's role with respect to public broadcasting. Public broadcasters have no greater obligations under the Communications Act of 1934, *as amended*, 47 U.S.C. §§ 151 *et seq.* ("Communications Act"), than commercial broadcasters. Nor does the Public Broadcasting Act of 1967, *as amended*, 47 U.S.C. §§ 390-399b ("Public Broadcasting Act"), impose any such obligations on them. The only material distinction between commercial and public broadcasters is that the latter must operate on a noncommercial, nonprofit basis and, with limited exceptions, may not sell time or accept advertising. *See* 47 C.F.R. § 73.621 (1982); 47 U.S.C. § 399b (Supp. V 1981).

As the legislative record reveals, Congress assiduously sought to assure that the funds made available under the Public Broadcasting Act would not alter the existing sys-

tem of broadcast regulation in which local stations, whether commercial or noncommercial, are independent and free from federal government control. With the exception of the editorializing ban at issue here, Congress imposed no special programming obligations on public broadcast stations. Rather, within the framework of the Communications Act, which recognizes that all broadcasters have certain public responsibilities, Congress preserved the essentially private status of noncommercial broadcasters.

The government's position also reflects a basic misunderstanding of the First Amendment standard applicable to congressional attempts to limit public broadcasters' participation in public debate. The ban on editorializing is a content-based restriction which goes to the heart of the protections afforded by the First Amendment; accordingly, it can withstand First Amendment scrutiny only if it is narrowly tailored to serve a compelling government interest. The government's assertion that a lesser standard applies to First Amendment cases involving broadcast regulation, and an even lesser standard to public broadcasting, is without merit. Gov't Brief at 28-32. While some regulation of speech is permitted in the context of the broadcast media that would not be permitted in other media, those regulations, such as the fairness doctrine and personal attack rule, apply to all broadcasters and are predicated on the need for government licensing of scarce spectrum. *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94 (1973); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). That consideration is absent here, and the government has failed to identify any other special characteristic that justifies singling out public broadcasters for lesser First Amendment protection.

Further, the government has not shown that Section 399 serves any important, let alone compelling, government interest. To preserve the independence of public broadcast licensees from federal government control, it is

not necessary to suppress their editorial views. The government's fears that public broadcasters might speak with a monolithic, government-controlled voice, or be captured by other narrow interest groups, are unfounded. The diversity of public broadcast station ownership and funding, the dependence of the local station on its community for support, the insulation mechanisms of the Public Broadcasting Act, and the licensing scheme administered by the FCC effectively preclude any such abuses.

The government assumes that expression of a private opinion by a public broadcaster is an evil to be avoided. However, no valid government purpose is served by shielding the public from public broadcasters' editorial opinions. Editorializing furthers the robust debate on issues of public importance and is consistent with public broadcasting's mission. Nor is there any danger that the public will be misled by a public broadcaster's open espousal of a particular view. *Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1252 (1949).

Finally, Section 399 is not the least restrictive alternative for addressing Congress' concerns about preventing the use of public broadcast stations for government propagandizing. The least intrusive remedy is simply to forbid CPB or the federal government from influencing public broadcasters' programming decisions. The government's paternalistic approach flies in the face of established First Amendment principles; more, not less, speech is the appropriate antidote for undesirable views. *Whitney v. California*, 274 U.S. 357, 375-77 (1927) (Brandeis, J., concurring).

ARGUMENT

I. PUBLIC BROADCASTING IS NOT A FEDERAL ENTERPRISE, BUT A LOCAL ONE FOR WHICH CONGRESS HAS PROVIDED FINANCIAL ASSISTANCE TO ENHANCE THE LOCAL STATIONS' SERVICE.

Recognizing that the Section 399 ban on editorializing cannot be justified under traditional First Amendment standards, the government argues that it is nonetheless a constitutional infringement on public broadcasters' First Amendment rights because of "the special character of noncommercial—'public'—broadcasting" Gov't Brief at 5-6. The government exploits the popular connotation of "public" to argue that noncommercial broadcasters have a special obligation to their communities that justifies greater restrictions on their First Amendment rights than would be permitted for "private" commercial broadcasters.² The government is wrong on both the facts and the law.

² Throughout the House hearings on the Public Television Act of 1967, Representative MacDonald protested that public television was a misnomer precisely because it suggests this misleading dichotomy between public and private broadcasting. *Public Television Act of 1967: Hearings on H.R. 6736 and S. 1160 Before the House Comm. on Interstate and Foreign Commerce*, 90th Cong., 1st Sess. 42-43, 106, 130, 154-155, 203, 669 (1967) (hereinafter cited as "*House Hearings*").

Public broadcasting is simply another name for noncommercial educational broadcasting, coined by the Carnegie Commission to differentiate that part of the noncommercial television station's program schedule which is directed to the general public at home from that part which is directed to students in the classroom. *Public Television Act of 1967: Hearings on S. 1160 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 90th Cong., 1st Sess. 22-23 (1967) (statement of John Gardner, Secretary of HEW) (hereinafter cited as "*Senate Hearings*"). The term quickly found favor and gained currency because it helped to free noncommercial broadcasting from the stigma of being strictly "instructional."

A. The Public Broadcasting Act Was Intended To Aid Local Public Broadcast Stations.

When Congress adopted the Public Broadcasting Act of 1967, the nation already had a system of public broadcasting that was funded largely through educational appropriations at the state and local levels.³ While the Public Broadcasting Act added an important national dimension to public broadcasting's funding, it did not create a federal broadcasting network. Nor did it change the independent character of the existing public broadcast stations. On the contrary, Congress scrupulously sought to preserve a broadcasting system in which commercial and noncommercial broadcasters alike remain autonomous and free from any federal government control or influence.⁴

The Public Broadcasting Act represents Congress' decision that public broadcasting is an endeavor worthy of financial support. Concerned, however, that a larger infusion of federal funds might create opportunities for improper federal government influence over programming, Congress adopted the recommendations of the Carnegie Commission on Educational Television⁵ and authorized the creation of a private, nonprofit corporation to distribute these funds to the stations and to program producers. Incorporated in 1968 under the District of Columbia Nonprofit Corporation Act, the Corporation for Public Broadcasting serves as that independent, nongovernmental cor-

³ The use of broadcast frequencies for noncommercial educational use dates back to 1919; the FCC reserved spectrum for educational radio in 1945, and for noncommercial educational television in 1952. Carnegie Commission on the Future of Public Broadcasting, *A Public Trust* 33 (1979).

⁴ See *Senate Hearings* at 9 (statement of Sen. Pastore), 93 (statement of Rosel Hyde, Chairman, FCC); S. Rep. No. 222, 90th Cong., 1st Sess. 7-8, 11 (1967); H. Rep. No. 572, 90th Cong., 1st Sess. 18 (1967).

⁵ Report of the Carnegie Commission on Educational Television, *Public Television—A Program for Action* (1967).

poration. 47 U.S.C. § 396(a)(6) and (7) (Supp. V 1981).

Congress took great pains to insure that CPB would not interfere with the freedom and autonomy of local public broadcast stations and, in particular, would not exercise any control over their programming decisions. It specifically charged CPB with "carry[ing] out its purposes and functions and engag[ing] in its activities in ways that will most effectively assure the maximum freedom of the public telecommunications entities and systems from interference with, or control of, program content or other activities." 47 U.S.C. § 396(g)(1)(D) (Supp. V 1981). And it barred CPB from any operational activity, such as owning stations, or producing, scheduling and distributing programs. 47 U.S.C. § 396(g)(3) (Supp. V 1981).

Recently, Congress has also restricted CPB's discretion in the allocation of its funds. Under the Public Broadcasting Amendments Act of 1981, Pub. L. 97-35, 95 Stat. 725, the majority of the funds administered by CPB (61.9% in the most recent CPB authorization) is passed through directly to the local stations according to a statutorily-based formula that takes into account objective factors such as market size. 47 U.S.C. § 396(k)(3)(A) and (k)(6) (Supp. V 1981). Although CPB has some discretion, within statutory constraints, to adjust this formula, it has no discretion to withhold any funds from stations and no authority to restrict in any way how stations use these funds. 47 U.S.C. § 396(k)(6) and (7) (Supp. V 1981).

CPB also administers a program fund from which it awards grants and contracts for production and acquisition of public television and radio programs. 47 U.S.C. § 396(k)(3)(B)(i) (Supp. V 1981). However, CPB has no authority to compel the broadcast of any program that it funds and, in the past, stations have repeatedly chosen not to air programs funded by CPB.

Thus, while the Public Broadcasting Act provides federal assistance to the local stations, it does so in a manner which preserves their complete, unfettered programming discretion. This overriding congressional concern for maintaining local public broadcast stations' autonomy is capsulized in Section 398, which further prohibits the federal government from using its funds as a lever to influence the programming activities of CPB or the stations. 47 U.S.C. § 398 (Supp. V 1981).

B. The Public Broadcasting Act Imposes No Special Programming Obligations on Public Broadcast Stations.

The government attempts to twist this statutory scheme, which Congress designed to insulate local public broadcast stations, into a scheme intended to foist special obligations on public broadcasting that are inconsistent with editorializing. The government relies on various provisions of the Public Broadcasting Act as evidence of public broadcasters' higher obligation. Gov't Brief at 16-17 & n.31. But, with the exception of the editorializing ban challenged here, none of these provisions restricts in any way the local public broadcaster's programming discretion.

For example, the government cites, as evidence of a special mandate, the requirement of "strict adherence to objectivity and balance in all programs or series of programs of a controversial nature" contained in 47 U.S.C. § 396(g)(1)(A) (Supp. V 1981). Gov't Brief at 17. This provision, however, does not apply to public broadcast stations, but only to CPB and the programs it funds. And, even as to CPB, this statutory provision serves only "as a guide to Congressional oversight policy and as a set of goals to which the Directors of CPB should aspire." *Accuracy in Media v. FCC*, 521 F.2d 288, 297 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 934 (1976).

Nor are the accounting and financial disclosure provisions in the Public Broadcasting Act designed to do more

than provide the minimum information necessary to assure Congress that CPB funds are disbursed for the purposes for which they are appropriated.⁶ Similarly, the purely advisory role of community advisory boards in no way diminishes the public broadcast station's editorial independence. The Act specifically provides that "[I]n no case shall the board have any authority to exercise any control over the daily management or operation of the station." 47 U.S.C. § 396(k)(9)(C) (Supp. V. 1981).

The equal opportunity employment provisions simply reflect the national policy against discrimination in employment. Congress added these provisions in 1978 to assure that, even though CPB is not a federal agency, public broadcasters receiving financial assistance from it comply with the policies of Title VI.⁷ In doing so, Congress was careful to preserve local stations' independence from CPB and did not give CPB any enforcement

⁶ Congress carefully limited the audit requirements to avoid any possibility of control. Only CPB, not individual public broadcast stations, is subject to a GAO audit (47 U.S.C. § 396(l)(3)(B), (C) & (D)), and even as to CPB, the purpose of such audits "is concerned primarily with financial accountability and improved management of agency activities—not control." *House Hearings* at 24.

The Conference Report emphasizes that "the General Accounting Office is authorized, but not required, to audit the financial transactions of the Corporation," and explains that:

Provision for a GAO audit was not originally included in H.R. 6736 because it was felt that such audits carry with them the power of the Comptroller General to settle and adjust the books being examined and that this authority would be contrary to the desired insulation of the Corporation from Government control. The Committee is also sensitive to the importance of having the Corporation free from Government control. However, the bill does not provide authority for the settlement of accounts.

H.R. Rep. No. 794, 90th Cong., 1st Sess. 14-15 (1967).

⁷ See H.R. Rep. No. 1178, 95th Cong., 2d Sess. 38-40 (1978); see also *Senate Hearings* at 71 (Memorandum from Alanson Wilcox, General Counsel, HEW).

powers.⁸ And last, the prohibitions against operating for profit, selling time, or accepting advertising simply define what differentiates public broadcasting from its commercial counterpart. They do not impose any special obligations that would justify the ban on editorializing.

Thus, none of the provisions cited by the government supports its contention that the Public Broadcasting Act created any special, inextricably linked set of obligations that hinge upon the editorializing ban. Section 399 is the only provision affecting the programming discretion of public broadcasters. In all other respects, Congress was sensitive to the First Amendment interests at stake and sought to achieve its objectives without intruding on the public broadcaster's journalistic discretion.⁹ Ironically, the effect of upholding the constitutionality of Section 399 would be to sanction the very federal control that the government argues the editorializing ban was intended to prevent.

C. State and Local Government Participation in Public Broadcasting Does Not Make It a Federal Government Enterprise.

The government, in an effort to create an impression of greater federal involvement in public broadcasting, blurs the distinction between federal, as opposed to state or

⁸ Enforcement of the equal opportunity employment provisions of the Public Broadcasting Act is committed to HEW, now the Department of Health and Human Services. 47 U.S.C. § 598(b)(2)-(5) (Supp. V 1981).

⁹ The government erroneously suggests that Section 397(9), which formerly defined educational television and radio programs as "primarily designed for educational or cultural purposes" somehow restricts the types of programs CPB may fund or public broadcast stations may air. Gov't Brief at 16. The government's argument is predicated on an earlier definition that is no longer applicable, and even at the time that definition applied, it was at best applicable only to CPB's activities and not to public broadcast stations. See Pub. L. No. 90-129, § 201, 81 Stat. 371 (1967). In all events, the definitional language is hortatory and has never been construed as limiting public broadcasters' programming discretion.

local, government funding and ownership of public broadcast stations.¹⁰ There is no basis, however, for equating the participation of state and local entities with that of the federal government. From the beginning, when the FCC reserved frequencies for noncommercial educational use, it was contemplated that many public broadcast facilities would be licensed to and financed by state and local government entities. *Sixth Report and Order on Television Allocations*, 40 F.C.C. 148, 164-167 (1952); *id.* at 592 (separate opinion of Commissioner Hennock). In 1962, when Congress first provided funding for public broadcasting, it was aware of this state and local government involvement and sought to protect these licensees from federal government control or influence.¹¹ In 1967, it was equally clear that Congress did not intend the Public Broadcasting Act to restrain in any way the control of state and local licensees over their own public broadcast facilities.¹² Thus, the government's attempt to use this

¹⁰ Public broadcast licensees fall into four categories: community-based nonprofit educational corporations; state school board and educational broadcasting authorities; local school districts; and colleges and universities. As of February 1983, there were 159 public television licensees, of which 69 were nonprofit community corporations, 23 were state entities, 15 were local authorities, and 52 were institutions of higher education. These 159 licensees operated 300 transmitting stations, broken down by licensee type as follows: nonprofit community corporations (89), state entities (118); local authorities (17); and institutions of higher education (76).

¹¹ See, e.g., House debate on H.R. 132, 108 Cong. Rec. 3532 (Mar. 7, 1962) (statement of Rep. Walter), 3536 (statement of Rep. Roberts), 3539 (statement of Rep. Hemphill), 3548 (statement of Rep. Cramer), 3549 (statement of Rep. Barry).

¹² See, e.g., *House Hearings* at 417 (statement of Rep. Carter); see also legislative history cited at n.4 *supra*. 47 U.S.C. § 398(a) (Supp. V 1981), which prohibits federal intervention in local station operations, was originally enacted as part of the Educational Television Broadcasting Facilities Act of 1962, Pub. L. No. 87-447, 76 Stat. 64, which Congress viewed as designed to aid state and local educational authorities. In 1967, when state involvement in public broadcasting was equally clear, Congress strengthened Section 398 to provide greater protection for local licensees.

state and local involvement to justify Section 399 is inconsistent with the congressional objectives underlying federal support for public broadcasters.

In any event, this state and local involvement is irrelevant to the constitutionality of Section 399, which is triggered only by receipt of CPB funds. That state and local governments provide support for public broadcast stations does not enlarge the federal government's right to regulate their programming. As the government recognizes, "Congress adhered to the tradition of not creating federally owned stations and chose instead to furnish assistance to noncommercial stations owned and controlled by others." Gov't Brief at 16.¹³

The government ignores this distinction and misleadingly states that "[government]" owns "the majority of public stations." Gov't Brief at 7. While it is true that a substantial number of public broadcast licensees are state or local government entities, the federal government does not own a single public broadcast station.¹⁴ Similarly, the government's claim that "[g]overnment" supplies "more than 60% of the public broadcasting income" (Gov't Brief at 7) improperly merges federal, state, and local government funding sources. In fiscal year 1982, the most recent year for which figures are available (and also the year in which CPB funding reached its highest point prior to the recent cutbacks), CPB ac-

¹³ The government's attempt to merge the state and local role with that of the federal government, characterizing it all as "governmental," loses sight of the First Amendment interest in preserving the autonomy of state and local licensees. For the reasons set forth by Justice Stewart in *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94, 139-141 (1973), to treat public broadcasters licensed to state entities as synonymous with federal government control would be to strip them of any First Amendment rights vis-a-vis the federal government. This result would be inimical to public broadcasters' own First Amendment rights and wholly at odds with the independent broadcasting system established under the Communications Act.

¹⁴ Indeed, the federal government is statutorily barred from such ownership. 47 U.S.C. § 305 (Supp. V 1981).

counted for only 20.5% of the funding for public broadcasting.¹⁵ Moreover, in that same fiscal year, only 12.4% of the \$135 million in nationally distributed public television programming was funded in whole or in part by federal money.¹⁶ Even this percentage is misleading because a significant part of this money came from agencies, such as the Department of Education, whose contributions do not trigger the Section 399 prohibition.

The government's attempt to cast public broadcasting in a special "governmental" role exaggerates the importance of the federal contribution upon which Section 399 is predicated. While important, this contribution is not public broadcasting's sole support. Other entities, both public and private, play an equally important financial role.¹⁷ Moreover, as far as the potential for government

¹⁵ The remaining funds came from public broadcasting membership fundraising (19.1%), state government (18.9%), state colleges and universities (10.7%), businesses (10.7%), local governments (5.1%), federal grants and contracts (3.1%); foundations (2.6%), and all other sources (9.3%). Contributions from private sources accounted for a total of 41.7% of public broadcastings's FY 1982 revenues; tax-based sources contributed 58.3%. CPB, "Public Broadcasting Income, Fiscal Year 1982 (Preliminary)."

¹⁶ These figures only reflect the value of programming distributed nationally by PBS. If the cost of local and regional programming were also taken into account, the percentage attributable to federal funding would be even lower.

¹⁷ In 1976, almost ten years after passage of the Public Broadcasting Act, the Senate Report on a bill to extend the Educational Broadcast Facilities Program stated:

It is worth emphasizing that the total Federal investment in the facilities program to date—approximately \$106 million—has been less than 10 percent of the gross expenditure from public and private sources, and has stimulated an investment in excess of \$1 billion. School systems, universities, corporations, foundations, and other public and private organizations, as well as individual citizens, have thus provided the matching cooperation and contributions which have been essential for the creation and development of local public broadcasting stations across the nation.

control is concerned, it is inaccurate to treat disparate federal, state, and local funding sources as one. Each is motivated by different interests, and they do not act in concert.¹⁸

II. THE EDITORIALIZING BAN IS AN UNCONSTITUTIONAL RESTRICTION ON THE CORE FIRST AMENDMENT RIGHT OF PUBLIC BROADCASTERS TO PARTICIPATE IN THE DEBATE ON ISSUES OF PUBLIC IMPORTANCE.

A. Section 399 Is a Content-Based Regulation Which Can Be Justified Only Under the Strictest First Amendment Standards.

The government does not claim that any compelling government interest justifies the editorializing ban, but only that it furthers "important" government interests. Gov't Brief at 34, 35, 39. The government justifies this less stringent standard on the ground that broadcasting is not entitled to full First Amendment protection and that Section 399 is a content-neutral regulation. Gov't Brief at 8, 28-32.

While it is true that this Court has allowed certain limited restrictions on the free speech rights of broad-

¹⁸ In apparent recognition of the lesser state and local governmental involvement with community licensees, many of whom are major national program suppliers for public television, the government argues that the tax exempt status of these licensees is evidence of government entwinement. Gov't Brief at 20. However, this in no way distinguishes public broadcast stations from any other tax exempt entity, including many commercial broadcast stations, that must comply with the Internal Revenue Code provisions under which it qualifies for its exemption. Nor is it relevant to whether, consistent with the First Amendment, Congress can impose greater restrictions on the speech of public broadcasters. The limitations Congress has imposed on the activities it will subsidize through tax exemptions are properly reflected in the Internal Revenue Code and enforced by the Internal Revenue Service, not the Federal Communications Commission. *Cf. Community Television of Southern California v. Gottfried*, — U.S. —, 103 S.Ct. 885 (1983).

casters that would not be permitted in other media, in each case, the limitation was justified by some special characteristic of the broadcast media. See, e.g., *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). The government argues that the scarcity and unique power of broadcast frequencies, which have justified other limitations on broadcasters' First Amendment rights, such as the fairness doctrine and personal attack rules, also justify the ban on editorializing. Gov't Brief at 29-32.

The government's argument is flawed on two counts. First, the regulations the government relies upon were designed to insure that broadcasters fulfill the public interest obligation they assumed when they received their licenses. Those regulations are intended to increase, not restrict, the diversity of views available to the public. The government cannot point to any other regulation designed to censor broadcasters' editorial judgments; and no other regulation precludes broadcasters from contributing to the debate on issues of public importance.¹⁹

Second, none of those regulations singles out public broadcasters for special treatment. To the extent that scarcity is the rationale for limiting broadcasters' First Amendment rights, it applies with equal force to commercial broadcasters. The FCC has exactly the same regulatory power over both commercial and noncommercial licensees.²⁰ Noncommercial educational broadcasters are subject to the same technical and programming rules

¹⁹ The FCC's oversight power to consider a licensee's use of indecent language, *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), does not have the same preclusive effect on First Amendment rights as the ban at issue here. *Pacifica* requires licensees to be sensitive to community standards in choosing language to express their views, but it does not bar expression of those views. 438 U.S. at 743 n.18.

²⁰ *House Hearings* at 205 (statement of Rosei Hyde, Chairman, FCC). See *Community Television of Southern California v. Gottfried*, — U.S. —, 103 S.Ct. 885 (1983) (FCC to review public broadcasters' service to the handicapped under the same standard applicable to commercial broadcasters).

(fairness doctrine, personal attack and equal time) as commercial broadcasters. And, prior to 1967, both commercial and noncommercial broadcasters were permitted to editorialize. The government has not identified, nor can it, any special characteristic of the broadcast medium that justifies the lesser First Amendment protection for public broadcasters accorded by Section 399.²¹

Also without merit is the government's assertion that "Section 399 is a content-neutral regulation designed to

²¹ The only unique characteristic the government has identified is the fact that public broadcasters receive CPB funds. The government relies on this assistance to argue that Section 399 is a valid exercise of the Spending Power, merely restricting the activities Congress has chosen to fund. This argument mischaracterizes the impact of Section 399. It is not a limit on the manner in which public broadcasters may use CPB funds, but a condition imposed on their acceptance of those funds. Section 399 prohibits public broadcasters not just from using CPB funds to present editorials, but from editorializing if they receive any assistance from CPB at all. Under the government's rationale, if a local station receives from CPB so much as one dollar appropriated by Congress, and uses that dollar for general operating expenses, then Congress is free to attach conditions to the use of that dollar that restrict the broadcaster's programming discretion in *all* of its broadcast activities. The government's argument opens the door wide to government censorship under the guise of simple restrictions on what the government chooses to subsidize rather than infringements on First Amendment rights.

Accordingly, the editorializing ban is distinguishable from the restriction involved in *Regan v. Taxation With Representation*, — U.S. —, 103 S.Ct. 1997 (1983), where the federal subsidy in fact funded the proscribed activity, and where Congress provided an alternative in § 501(c)(4) of the Internal Revenue Code that would permit plaintiff to lobby. No such alternative is available to public broadcasters. Consequently, if Section 399 is to pass constitutional muster, it must meet the strict scrutiny required for any restriction on First Amendment rights. See, e.g., *Speiser v. Randall*, 357 U.S. 513 (1958). As we demonstrate, and as the district court held, it cannot pass that test. Cf. *Community-Service Broadcasting v. FCC*, 593 F.2d 1102, 1110 (D.C. Cir. 1978) (*en banc*).

assure that public funds do not go to subsidize private political and ideological activity." Gov't Brief at 8. On its face, Section 399 discriminates between different types of expression and bans only one: editorializing. The attribute that brings programming within the ban is strictly its content, namely whether it expresses the opinion of the station management.²² It is immaterial that editorializing encompasses a range of viewpoints. A regulation that restricts particular kinds of speech is content-based.²³

Even if, as the government suggests, the neutral purpose of Section 399 were to prevent public funds from subsidizing private political and ideological activity, it fails to achieve this result.²⁴ The government acknowledges that public broadcasters are free to present the private political and ideological views of anyone other than the station management. Gov't Brief at 8, 41. Therefore, to the extent that public funds support public broadcasting, they subsidize the private political and ideological views of every guest interviewed on a public affairs program, every producer of a documentary, and

²² In fact, the legislative history indicates that members of Congress were chiefly concerned that the content of public broadcast editorials might be unfavorable to them personally. See 113 Cong. Rec. 26,388, 26,391, 26,399 (1967).

²³ See *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Carey v. Brown*, 447 U.S. 455, 462 n.6 (1980); *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977); *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972); *Community-Service Broadcasting v. FCC*, 593 F.2d 1102, 1111-1112 (D.C. Cir. 1978).

²⁴ The government's statement that it would be fundamentally wrong to use tax money to support private views (Gov't Brief at 40) misconstrues the First Amendment interest involved. As this Court has recognized, "every appropriation made by Congress uses public money in a manner to which some taxpayers object"; the First Amendment does not preclude the use of public funds to enhance, rather than suppress, private expression. *Buckley v. Valeo*, 424 U.S. 1, 90-93 (1976).

every citizen who delivers an editorial. In short, every private view but one—that of the station management—is permitted to be expressed.

B. Section 399 Serves No Compelling Government Interest.

Section 399 is a content-based regulation that goes to the heart of the free speech rights protected by the First Amendment. To survive First Amendment scrutiny, it must serve a compelling government interest and be narrowly tailored to that end. *See Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 535 (1980); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). The government has not advanced any interest that is sufficiently compelling to justify the restriction that Section 399 imposes on public broadcasters' exercise of their First Amendment rights. Indeed, the government has not even shown that Section 399 is narrowly tailored to achieve any valid government purpose.

1. The Editorializing Ban Is Not Necessary To Prevent Federal Government Control of Public Broadcasters' Programming.

The government claims that the editorializing ban is necessary to forestall any attempt by the federal government to use the power of the purse to create a government propaganda machine. This fear that public broadcasters could ever speak with a monolithic, government-controlled voice is unfounded. First, the safeguards Congress built into the Public Broadcasting Act serve to insulate the stations from such control. And nothing could be plainer than the injunction in 47 U.S.C. § 398 (Supp. V 1981) against federal control or interference in public broadcasting.

Second, each public broadcast licensee operates independently of other public broadcast licensees and is managed by individuals who are answerable to different entities, none of which speaks with a common voice. Each

exercises absolute programming discretion and bears sole responsibility for the material it broadcasts. During the Senate debate on the Public Broadcasting Act, concerns about a possible federal government "takeover" of programming were raised and quickly laid to rest:

Most significant of the means to prevent any 'take-over' is that each local TV station is itself a complete locally controlled entity. Stations are licensed to universities, school systems and educational organizations, themselves responsible to local legislatures or citizens boards. Their charters and their Federal Communications Commission licenses forbid Federal program censorship of any sort.

Senate Hearings at 20 (statement of Sen. Pepper).

Third, contrary to the government's contention that " 'public' television stations may be less answerable to the public than commercial stations" (Gov't Brief at 40), public broadcasters are at least as, if not more, accountable. Every public broadcast licensee, regardless of its ownership, is ultimately responsible to an entity that represents the public: state and local government licensees are responsible to the citizens through their government; college licensees are responsible to their educational institutions and the communities those institutions serve; and community licensees answer to boards drawn from, and representative of, the entire community. Station management and boards have a built-in sensitivity to their community's reaction to the political overtones in their programming.²⁶

Public broadcasters are also directly dependent on the public for contributions, volunteer help, corporate underwriting, donations of goods and services, contributions from local businesses, and state and local funding. This

²⁶ *Senate Hearings* at 55 (statement of John Gardiner, Secretary of HEW); *House Hearings* at 161-162 (statement of Mr. Henry), 270 (statement of Mr. Case), 481 (statement of Mr. Schenckan), 514 (statement of William G. Harvey), 516 (statement of Mr. McBride).

support is critical to the operation of their stations. Therefore, were a public broadcaster to embark on an editorial course that the audience opposed, the problem would be self-correcting.

Finally, the government's fear that public broadcast stations might be captured by a narrow interest group is irrelevant to the justification for Section 399, which is tied to CPB funding. In any event, this potential problem existed long before passage of the 1967 Act, and Congress has enacted appropriate safeguards in the Communications Act to deal with it. See 108 Cong. Rec. 3553 (Mar. 7, 1962) (statement of Rep. Moss). The existing system of broadcaster accountability administered by the FCC precludes the federal government, or any narrow interest group, from exercising undue influence on public broadcasters' programming. In addition, regulations such as the fairness doctrine assure that the public will receive access to a diversity of views on issues of public importance. See *Accuracy in Media, Inc. v. FCC*, 521 F.2d 288, 295 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 934 (1976).

2. No Valid Government Purpose Is Served by Shielding the Public from Public Broadcasters' Editorializing.

Underlying the government's justification for Section 399 is the assumption that expression of private editorial opinion by a public broadcaster is an evil to be avoided. The government's position runs directly counter to established First Amendment principles, which recognize the valuable community service editorials provide. See *Mills v. Alabama*, 384 U.S. 214 (1966). The FCC has underscored the importance of licensee editorializing by identifying this as one of fourteen necessary program elements in a station's service. *Report and Statement of Policy Re: Commission En Banc Programming Inquiry*, 44 F.C.C. 2303 (1960).²⁶

²⁶ Cf. *RKO General, Inc.*, 44 F.C.C.2d 149, 219 (1969) ("The policy of not presenting editorials runs squarely athwart Commission

Public broadcaster editorializing is not the source of the evils the government fears. First, there is little danger that the public would be misled or duped if editorializing were permitted. An editorial is unabashedly and openly a statement of opinion, and everyone recognizes it as such. As the FCC has recognized, "[c]ertainly the public has less to fear from the open partisan than from the covert propagandist." *Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1254 (1949).

Second, Section 399 does nothing to eliminate biased coverage of public affairs, and several congressmen made this very point:

This Corporation could be a propaganda monster, although we have said there shall be no editorializing. Let us be realistic. An editorial is not very persuasive or influential. Let them go ahead and editorialize. Give me the right to control program content, and others can editorialize all they want to, but I will influence the thinking of the American public more with the programs or with people I have appearing on the programs.

The American public knows editorials are subjective, but they believe regular programs are objective.²⁷

policy"); *Evening Star Broadcasting Co.*, 27 F.C.C.2d 316, 332 (1971) ("we consider noteworthy the fact that the licensee has regularly editorialized"); *WHDH, Inc.*, 16 F.C.C.2d 1, 10 (1969), *reh'g denied*, 17 F.C.C.2d 856, 859 (1969) (slight demerit assessed against applicant to be owned by tax-exempt foundation which would restrict its ability to editorialize).

²⁷ 113 Cong. Rec. 26,392, 26,405 (Sept. 21, 1967) (statement of Rep. Watson). See 113 Cong. Rec. 26,408 (Sept. 21, 1967) (statement of Rep. Brown).

The government erroneously asserts that Section 399 precludes the broadcast of "federal government propaganda" (Gov't Brief at 22 n.46). However, it is only licensee editorializing, not general programming, that falls within the ban. If federal funding were indeed a coercive lever, it could be used to compel the broadcast of the very propaganda the government thinks Section 399 prohibits.

These issues were among those considered by the FCC when it reversed its earlier ban and decided to allow broadcast editorials. The Commission concluded that fears similar to those raised by the government:

are largely misdirected [and] stem from a confusion of the question of overt advocacy in the name of the licensee, with the broader issue of insuring that the station's broadcasts devoted to the consideration of public issues will provide the listening public with a fair and balanced presentation of differing viewpoints on such issues Assurance of fairness must in the final analysis be achieved, not by the exclusion of particular views because of the source of the views, or the forcefulness with which the view is expressed, but by making the microphone available for the presentation of contrary views without deliberate restrictions designed to impede equally forceful presentation.

Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1253 (1949). By taking the opposite approach and banning editorializing, Congress has deprived the public of a valuable community service and restricted the one form of expression in which bias or opinion is openly acknowledged.

The government is also wrong when it asserts that editorializing is inconsistent with public broadcasting's mission. Gov't Brief at 33-35. Under the First Amendment, public broadcasters are entitled to the same editorial rights as other journalists, and, prior to 1967, they enjoyed those rights. During this period, public broadcasters received federal funds for systems construction, equipment, programming, training, research, and planning under programs administered by the Department of Health, Education, and Welfare. *House Hearings* at 23-24, 84-87. In authorizing those funds, Congress was sensitive to the possibility of federal government pressure and committed to preserving the local public broadcast licensee's complete and unfettered control over program-

ming.²⁸ Although none of the legislation authorizing these HEW programs prohibited editorializing by public broadcasters, there were no problems with improper federal government influence.²⁹

The government's statement that public broadcasting is obligated to "serve all" and that this is inconsistent with expression of private views stands the First Amendment on its head. Gov't Brief at 33. For it is precisely when government begins to define permissible programming that government control and influence over program content become a reality rather than a distant fear. To the extent that serving diverse audiences is one of public broadcasting's goals, it does not require bland, noncontroversial programming that reflects a consensus view rather than a private one. Rather, "service to all" is achieved by providing a range of private views to address controversial issues from diverse perspectives. And it is clear that Congress intended public broadcasters to participate fully in the debate on issues of public importance: "[p]articularly in the area of public affairs . . . noncommercial broadcasting is uniquely fitted to offer in-depth coverage and analysis which will lead to a better informed and enlightened public." S. Rep. No. 222, 90th Cong., 1st Sess. 7 (1967).

The editorializing ban prevents public broadcasters from addressing important local issues in the most effective manner. For example, a Denver newspaper recently deleted the program listings for a public television station from its daily grid. The station wanted to go on the air and encourage viewers to write protest letters to the newspaper, but felt constrained by Section 399. Another

²⁸ See House debate on H.R. 132 at n.11 *supra*.

²⁹ As Congressman Springer observed in the House debate on the Public Broadcasting Act, ". . . anyone who has had any experience in the past six years knows there has not been the slightest control of any kind exercised by the Federal Government in making grants." 113 Cong. Rec. 26,407 (Sept. 21, 1967).

example involves public television's efforts to use a program scheduled for this fall, *The Chemical People*, as the focus for community outreach efforts to deal with drug and alcohol abuse. This is precisely the kind of effort that could be enhanced by allowing stations to editorialize about these problems.

The government stresses the dangers of allowing public broadcasters to become embroiled in "political" or "partisan" issues (Gov't Brief at 34), but that part of Section 399 which bars noncommercial educational broadcasting stations from supporting or opposing any candidate for political office is not challenged here. At issue is the right of public broadcasters to contribute to the public debate by providing an important perspective on the broad range of problems that arise in every community: fair housing, equal employment opportunity, environmental concerns, public and private transportation, police methods and procedures, consumer protection, public education, local and state government, city and area planning bodies, etc.

It does not suffice that public broadcasters can treat these issues in non-editorial formats. In many cases, restricting the broadcaster's choice of format silences his voice. Some issues do not lend themselves to longer treatment than an editorial. Others are time sensitive, and by the time the broadcaster could develop a program to deal with them, they would no longer be relevant. The fact that some public broadcasters may prefer not to address such issues through editorials is beside the point. Other public broadcasters will choose to editorialize.³⁰ The crucial First Amendment issue is whether the decision to editorialize is left to the public broadcaster or dictated by the federal government.

³⁰ In the 1979 study cited by the government, more than half of the responding station managers expressed willingness to editorialize. Wollert & Haney, *Editorializing and Fundraising: Does It Mix?* 7 Pub. Telecommunications Rev., No. 5, at 35 (Sept./Oct. 1979).

C. The Editorializing Ban Is Not the Least Restrictive Alternative for Addressing Concerns about Government Propaganda.

The government has not only failed to identify any important, never mind compelling, interest to support the editorializing ban, but has also failed to demonstrate that Section 399 is narrowly tailored to achieve the government's ends. To the extent that the government seeks to prevent the use of public broadcast stations for government propagandizing, the least restrictive alternative would be to stem the problem at its source and prohibit the federal government or CPB from attempting to influence public broadcasters' programming. This is the approach adopted in Section 398 of the Public Broadcasting Act, which bars "any department, agency, officer, or employee of the United States" from using the provision of federal financial assistance "to exercise any direction, supervision, or control over public telecommunications, or over the Corporation or any of its grantees or contractors" 47 U.S.C. § 398(a) (Supp. V 1981).³¹

To the extent that the government fears editorializing could result in misuse of a public broadcasting facility, those fears are based on a paternalistic attitude at odds with basic First Amendment principles. As this Court noted when it struck down a ban on advertising the prices of prescription drugs:

There is . . . an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 770 (1976). Thus, the

³¹ The only exception to this bar is in the area of equal opportunity employment and there it is clear that programming remains insulated. 47 U.S.C. § 398(c) (Supp. V 1983).

least restrictive alternative, and preferred First Amendment remedy, is not to silence the public broadcaster, but to insure that other viewpoints are afforded an opportunity to be heard. See *Whitney v. California*, 274 U.S. 357, 375-77 (1927) (Brandeis, J., concurring). This approach, reflected in the fairness doctrine and the FCC's editorializing rules, not only protects the First Amendment interests of broadcasters, but also furthers the First Amendment interest of the public in suitable access to diverse ideas on important issues.

CONCLUSION

For the foregoing reasons, Amici Curiae urge this Court to affirm the decision below and vindicate the First Amendment rights of public broadcasters and the listening and viewing public.

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No. 82-912-ADX
Status: GRANTED

Title: Federal Communications Commission, Appellant
v.
League of Women Voters of California, et al.

Docketed:
December 1, 1982

Court: United States District Court for the
Central District of California

Counsel for appellant: Solicitor General

Counsel for appellee: Guttentag, Lucas, Woocher, Frederic D

Entry	Date	Note	Proceedings and Orders
1	Oct 22 1982		Application for extension of time to docket appeal and order granting same until December 1, 1982 (Pehndquist, October 26, 1982).
2	Dec 1 1982	G	Statement as to jurisdiction filed.
4	Dec 27 1982		Order extending time to file response to jurisdictional statement until January 20, 1983.
5	Jan 25 1983		Motion of appellee League of Women Voters of CA to dismiss or affirm filed.
6	Jan 26 1983		DISTRIBUTED. February 18, 1983
7	Feb 16 1983	X	Reply brief of appellant filed.
10	Feb 22 1983		REDISTRIBUTED. Feb. 25, 1983.
11	Feb 23 1983		Further consideration of the question of jurisdiction is POSTPONED to the hearing of the case on the merits. *****
13	Apr 13 1983		Order extending time to file response to jurisdictional statement until May 14, 1983.
14	May 12 1983		Order further extending time to file response to jurisdictional statement until June 4, 1983.
15	May 23 1983		Order further extending time to file response to jurisdictional statement until June 11, 1983.
16	May 25 1983		Joint appendix filed.
17	Jun 6 1983		Application for leave to exceed the page limits on appellant's brief on the merits filed with WHR (A-976). Same is denied by Pehndquist, J.
18	Jun 7 1983		Brief amicus curiae of Mobil Corporation filed.
19	Jun 10 1983		Order extending time to file response to jurisdictional statement until September 12, 1983.
21	Jun 15 1983		Brief of appellant filed.
22	Jun 22 1983		Record filed.
23	Jun 24 1983		Certified original record on appeal received.
24	Jun 24 1983		Brief amicus curiae of PBS, et al. filed.
25	Sep 12 1983		Brief amicus curiae of CBS Inc., et al. filed.
26	Sep 12 1983		Brief amicus curiae of ACLU filed.
27	Sep 13 1983		Brief amicus curiae of Natl. Black Media Coalition filed.
28	Sep 16 1983		Brief of appellees League of Women Voters of California, et al. filed.
29	Sep 19 1983		Application for leave to exceed page limits on appellees' brief on the merits filed with WHP (A-201).
30	Sep 21 1983		Order denying application for leave to file appellees' brief on the merits in excess of page limitations by Pehndquist, J.
31	Sep 22 1983		CIRCULATED.
32	Sep 22 1983		
33	Nov 15 1983		

No. 82-912-ADX

Entry	Date	Note	Proceedings and Orders
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34	Nov 23 1983		SET FOR ARGUMENT. Monday, January 16, 1984. (3rd case)
35	Jan 5 1984	X Reply brief of appellant FCC filed.	
36	Jan 16 1984	ARGUED.	